

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

317
NO. 20,271

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING CO., and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

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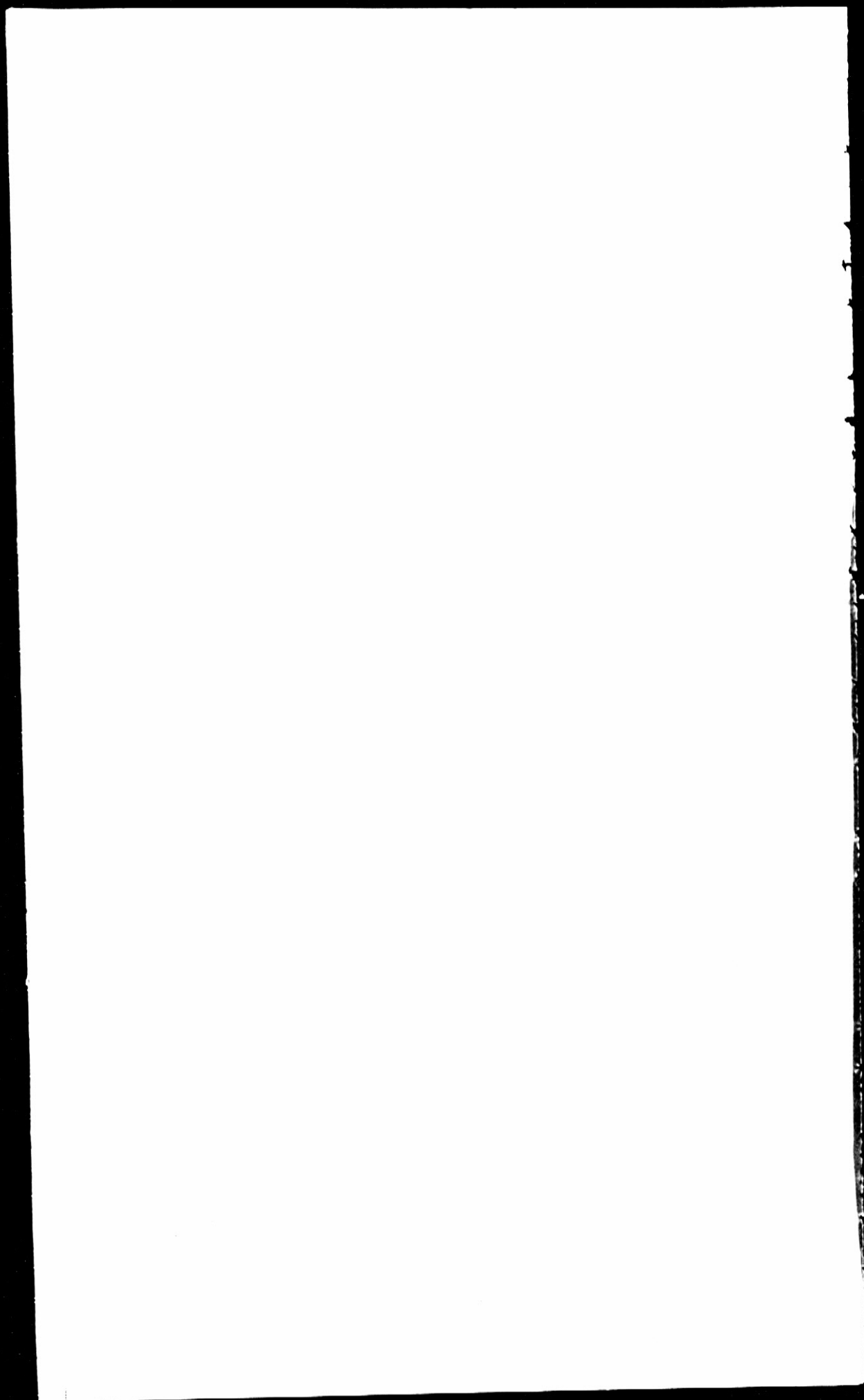
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(i)

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the adoption of certain new community antenna (CATV) rules by the Federal Communications Commission and their application to appellant constitute an unreasonable prior restraint on appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

2. Whether the Commission failed to give appellant and other interested parties adequate notice and adequate opportunity to comment upon provisions of the new CATV rules, in violation of Sections 4(a) and 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. Whether Section 74.1107 is an unlawful retroactive rule, and the Commission in implementing this rule failed to show "good cause" for waiving Section 4(c) of the Administrative Procedure Act.

4. Whether by drastically restricting the scope of appellant's hearing and by ordering an expedited hearing procedure, the Commission arbitrarily and unreasonably violated appellant's statutory and constitutional right to a full and fair hearing.

PRELIMINARY STATEMENT

Appellant herein filed with this Court on August 4, 1966 a motion to hold this appeal in abeyance because of the action of this Court in transferring to the Eighth Circuit jurisdiction over certain appeals challenging the validity of the Commission's Second Report and Order.* The Federal Communications Commission, appellee herein, argued in response that the action requested by appellant

* *Midwest Television, Inc. v. FCC*, Nos. 19,975 and 20,021; and *Midwest Video Corp. v. FCC*, No. 20,264 (July 13, 1966).

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should not be taken because this case raises some issues not present in the Eighth Circuit litigation. The Commission correctly pointed out that the appellant has alleged procedural error and arbitrary action in connection with the issuance of the Cease and Desist Order which affect this case, but which have nothing to do with the issues on appeal in the Eighth Circuit. On August 30, 1966 this Court, acting through the Chief Judge, held that on consideration of the motion and the responsive pleadings, the motion to hold in abeyance should be denied.

Therefore, appellant is filing its brief herewith. In doing so, it should be pointed out that appellant challenges the asserted jurisdiction of the Federal Communications Commission to regulate CATV systems that do not utilize microwave facilities to obtain signals for their CATV systems, but present only signals that are available directly off of the air. As this Court is aware, the question of Commission jurisdiction to regulate such CATV systems is now pending in the Eighth Circuit Court of Appeals, which appears to have received sole jurisdiction of this question as a result of this Court's action. In addition, appellant still has pending before the Commission its Petition for Reconsideration of the Second Report and Order, filed on March 25, 1966 in Docket No. 15971. This petition has not been acted upon by the Commission. Therefore, briefing of the questions related to the validity of the Second Report and Order or to the Commission's jurisdiction would not be appropriate at this time.

Unless directed by this Court, appellant will not brief nor argue the jurisdiction question, which is basic in this case. For the purposes of this brief, appellant will assume, without accepting, that the Commission's assertion of jurisdiction is valid. In the event this Court is not able to reach a decision favorable to appellant on the matters briefed herein, appellant respectfully reserves the opportunity to brief these other matters before this Court upon conclusion of the Eighth Circuit litigation.

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APPEAL FROM AN ORDER OF THE
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a cease and desist order issued by the Federal Communications Commission on May 27, 1966 and is brought under Section 402(b)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(7); Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009; and Rule 37 of the Rules of this Court. Notice of appeal was filed by appellant on June 26, 1966.

STATEMENT OF THE CASE

Preliminary Statement

The instant proceeding concerns the validity and legality of a cease and desist order issued by the Federal Communications Commission (Commission) on May 27, 1966 and directed to appellant, Buckeye Cablevision, Inc. (Buckeye).¹ Appellant is the owner and operator of a community antenna television (CATV) system in Toledo, Ohio. It receives the television broadcast signals of several stations at its antenna tower, amplifies these signals and then distributes them to subscribers in the Toledo area by means of coaxial cable. Appellant's entire operation is confined to the State of Ohio and does not utilize microwave relay facilities. The salient advantage it affords its subscribers is an increased choice of programming alternatives and high signal quality without necessity for erection of an individual antenna at each subscriber's home.

The History of Buckeye Cablevision, Inc.

Following public hearings in the early months of 1965, the appellant received a franchise to operate a CATV system in Toledo by unanimous vote of its City Council on May 7, 1965. Permits were also obtained from the neighboring communities of Sylvania, Maumee, and Perysburg. In July of 1965, Buckeye began its diligent efforts toward becoming operational. It contracted with Ohio Bell Telephone Co. for the construction of a CATV system to cover the greater Toledo area and made substantial payments in connection therewith. It purchased and accepted the delivery of equipment, leased office facilities, and employed and trained personnel. Buckeye's projected operations always envisioned the carriage of all signals it could receive off-the-air. When the Commission's new CATV rules were issued, it had invested

¹*Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798 (1966).

over \$500,000 in its CATV system and had committed itself to expenditures totaling at least \$5,777,000 over the next ten years.

Commission Attempts To Regulate the CATV Industry

Unsure of its jurisdiction under the Communications Act of 1934, as amended, to regulate CATV systems, and seeking guidance from the Congress to clarify its doubts, the Commission followed a circuitous route in the late 1950's and early 1960's as to whether it could and should assume jurisdiction over the growing CATV industry. Finally in 1965, based on the Commission's authority to allocate scarce frequencies and the end use to which they are applied, and because of increased concern with the impact that the CATV industry would have upon the orderly growth and development of its UHF and VHF television frequency allocations, the Commission assumed jurisdiction over all CATV systems employing microwave relay facilities.²

On this same day, it issued a Notice of Inquiry and Notice of Proposed Rule Making that contrary to its previous position tentatively concluded that the Commission had jurisdiction to regulate directly the entire CATV industry, including those systems which received all their signals off-the-air.³ The Commission invited comments on its proposed assumption of jurisdiction over all CATV systems irrespective of the use of microwave facilities, and on such broad substantive questions as what interim action the Commission should take with respect to CATV impact on UHF development, whether restrictions should be imposed on CATV extension of television signals, and

² *First Report and Order on Microwave Relays*, Docket Nos. 14895, 15233, 4 Pike & Fischer RR 2d 1725 (April 23, 1965).

³ *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 15971, 1 F.C.C. 2d 453 (1965) (hereinafter cited *Notice of Inquiry*).

the matter of CATV program origination. However, the Commission stressed that "the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations."⁴ No specific rules were proposed. Instead, the Commission assured interested parties that "a further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission,"⁵ and after study of the comments the Commission contemplated affording interested parties "oral argument on these important matters" and contemplated soliciting "oral testimony."⁶

No further notice of proposed rule making containing specific rule proposals was ever issued. Nor did the Commission provide a full evidentiary hearing or an opportunity for oral testimony or argument on specific rules. Instead, after receiving the comments solicited in its Notice of Inquiry, the Commission on February 15, 1966 released a public notice⁷ to the effect that it was asserting jurisdiction over all CATV systems, and that it had informally agreed upon a broad plan for the regulation of CATV systems. Its plan was to include new CATV rules soon to be written and incorporated in a report and order shortly to be issued, and legislative recommendations for Congressional consideration. The public notice, in broad terms, announced agreement upon rules relating to carriage and non-duplication requirements and upon a policy regarding importation of distant signals that was tied to the date of this notice.

On March 8, 1966 the new rules were finally agreed

⁴ Notice of Inquiry, ¶ 64.

⁵ *Ibid.*

⁶ *Id.* at ¶ 68.

⁷ Public Notice-G, No. 79927 (Feb. 15, 1966). A public notice is a press release, available at the Commission's offices in Washington, D. C.

upon and adopted by the Commission⁸ in the form of a Second Report and Order, which was published in the Federal Register on March 17, 1966.⁹ In general the new rules were adopted effective April 18, 1966, except the Commission purported to make Section 74.1107 relating to the extension of distant signals effective immediately upon publication in the Federal Register, and applied as of February 15, 1966.

The History of the Instant Proceeding

Buckeye commenced supplying signals to its subscribers on March 16, 1966, a date long after it had expected to be in operation, by carrying in full compliance with all laws and regulations all television signals it could receive off-the-air, without the use of any microwave. When the new CATV rules were first published on March 17, 1966, Buckeye was carrying two signals which the new rules seemed to define as "distant" signals, but whose carriage had previously not been contrary to any rule.¹⁰ On March 25, 1966 the Commission issued an Order to Show Cause why Buckeye Cablevision should not be required to cease and desist importing distant signals in violation of Section 74.1107 of the Commission's Rules. In particular the Commission stated that Buckeye was unlawfully supplying its customers the "distant signals" of WKBD-TV,

⁸ Public Notice-G, No. 80850 (March 8, 1966).

⁹ *Second Report and Order*, Dockets No. 14895, 15233 and 15971, 2 F.C.C. 2d 725, published in 31 Fed. Reg. 4540-73 (March 17, 1966) (hereinafter cited *Second Report and Order*).

¹⁰ Section 74.1107 prohibits any CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets, as defined by the American Research Bureau (ARB), from extending the signal of a television broadcast station beyond the Grade B contour of that station if any such "distant signal" was not being supplied as of February 15, 1966, except upon a showing that such extension is in the public interest. "Distant signal" is defined in Section 74.1101(i) of the new rules.

Detroit, Michigan and WJIM-TV, Lansing, Michigan (R. 1-4).¹¹

In this order the Commission allowed Buckeye only the minimum statutory period to prepare its case, directed the hearing examiner to certify the record immediately to the Commission for final decision upon closing the record, and directed that proposed findings of fact and conclusions of law be filed within seven days after closing of the record. It stated the sole issue to be resolved was compliance with Section 74.1107.

On March 25, 1966 appellant filed a petition before the Commission asking it to reconsider its Second Report and Order.¹² Appellant addressed itself in particular to two aspects of the new rules: 1) the artificial concept of Grade B contours; and 2) the effective date for implementing Section 74.1107 violated Section 4(c) of the Administrative Procedure Act, and this section was an unlawful retroactive rule. That day appellant filed a second petition before the Commission, wherein appellant demonstrated the need for a waiver of Section 74.1107 if Buckeye was not operating in compliance therewith.¹³ These petitions assumed, without conceding, that the Commission had constitutional authority to promulgate the Second Report and Order.

In the meantime, Buckeye was concerned that the hearing should have far greater scope than be restricted to the sole issue of alleged non-compliance with Section 74.1107. Accordingly, on April 18, 1966 it filed a Petition to Clarify or Enlarge Issues (R. 17-38), and a Petition for Continuance (R. 64-66). On the same day appellant filed

¹¹ This order stated Toledo was ranked as the 26th television market by ARB, and therefore the prohibitions of Section 74.1107 would be applicable.

¹² Petition for Reconsideration of Buckeye Cablevision, Inc., Docket No. 15971 (March 25, 1966).

¹³ Petition of Buckeye Cablevision, Inc. for Declaratory Ruling, for Waiver or Other Appropriate Relief, Docket No. 15971 (March 25, 1966).

a Petition for Reconsideration and Consolidation, requesting the Commission to reconsider its Order to Show Cause, and in the event it determined to proceed with the case to consolidate with the show cause hearing the issues raised in its Petition for Declaratory Ruling, For Waiver, or Other Appropriate Relief. (R. 39-63). On April 19, 1966 appellant filed a Petition for Stay requesting the Commission to stay, with respect to appellant, the effective date of the Second Report and Order. (R. 68-79).

On April 27, 1966 the Commission, by order, denied appellant's request for reconsideration of that portion of the Order to Show Cause which scheduled the hearing to commence on April 28, 1966 and denied appellant's request for continuance of such hearing. It also denied appellant's petition to consolidate the show cause hearing with an evidentiary hearing on its petition for waiver. (R. 91-92).

During the prehearing conferences held on April 19th and April 25th the ~~hearing examiner~~ refused to consider any evidence not directly relating to the issue of compliance with the new rules. (Tr. 1-25, 26-39). The hearing was held on April 28, 1966. On May 5, 1966 appellant filed a request for oral argument before the Commission. (R. 303-05). On the same day appellant filed its proposed findings and conclusions of law and a brief in support thereof. (R. 208-20, 221-68).

The Commission's decision released May 27th denied the request for oral argument and the petition for enlargement of the issues. It also ordered Buckeye to cease and desist operating its CATV system in such a way as to extend the signals of any television broadcast station beyond its Grade B contours in violation of Section 74.1107 of the Commission's Rules, and in particular to cease and desist supplying its subscribers the signals of WJIM-TV, Lansing, Michigan.¹⁴ On the same day it denied appel-

¹⁴ 3 F.C.C. 2d 798-807. The Commission's evidence had established that the Grade B signal of Station WKBD-TV actually covered part of Toledo and was not, therefore, a distant signal under Section 74.1107.

lant's Petition for Declaratory Ruling, for Waiver, or Other Appropriate Relief, but treated the petition as a request for a hearing under Section 74.1107 of its rules and returned the same to the processing line.¹⁵ In a Memorandum Opinion and Order adopted the same day, the Commission denied Buckeye's petition for stay of the effective date of the Second Report and Order. (R. 357-72).¹⁶ No action has been taken on appellant's Petition for Reconsideration directed to the Second Report and Order.

STATUTES AND COMMISSION RULES INVOLVED

The following statutes and rules involved are printed as a supplement to this brief:

Sections 4(a), 4(b) and 4(c) of the Administrative Procedure Act, 5 U.S.C. §§ 1003(a), (b), (c).

Sections 312(b), (c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(b), (c).

Sections 409(a), (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 409(a), (b).

Section 74.1101(i) and Section 74.1107 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1101(i), 74.1107.

STATEMENT OF POINTS

1. The adoption of certain new community antenna (CATV) rules by the Federal Communications Commission and their application to appellant constitute an unreasonable prior restraint on appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

¹⁵ *Buckeye Cablevision, Inc.*, File No. CATV 100-5, 3 F.C.C. 2d 808 (1966). This is still pending at the Commission.

¹⁶ Memorandum Opinion and Order, Dockets No. 14895, 15233, 15971, 3 F.C.C. 2d 816 (1966).

2. The Commission failed to give appellant and other interested parties adequate notice of and adequate opportunity to comment upon provisions of the new CATV rules, in violation of Sections 4(a) and 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. Section 74.1107 is an unlawful retroactive rule, and the Commission in implementing this rule failed to show "good cause" for waiving Section 4(c) of the Administrative Procedure Act.

4. By drastically restricting the scope of appellant's hearing and by ordering an expedited hearing procedure, the Commission arbitrarily and unreasonably violated appellant's statutory and constitutional right to a full and fair hearing.

SUMMARY OF ARGUMENT

This appeal raises major questions of constitutional, statutory and administrative law. It focuses upon the Commission's compliance with requirements governing the process of orderly rulemaking, and it focuses upon appellant's due process rights to a full and fair hearing when the Commission seeks to enforce untested rules upon appellant.

Appellant first questions the constitutional validity of the Commission's new CATV rules, which in their application to Buckeye Cablevision, Inc. become an unreasonable prior restraint on appellant's rights to free speech protected under the First Amendment. The Commission has failed to justify that the new rules are in the public interest. Rather, it assumes that regulation of all CATV systems is necessary because of the possible effect they may have in discouraging growth of new UHF markets. But the Commission fails to consider the important ways that CATV systems in fact encourage UHF development. Furthermore, the rules are written so broadly that they go beyond their alleged legitimate purpose and instead jeopardize the free flow of information so precious to our society.

Next, appellant points out the serious violations of due process and the substantial departures from sound practices of orderly rule making that mark the Commission's adoption of the new CATV rules. In advance of adoption of these rules in the Second Report and Order, the Commission failed to issue specific rule proposals with full opportunity for public comment, as it had promised, in violation of Section 4(a) of the Administrative Procedure Act. The public was completely unaware of integral aspects of the new rules, and had no idea they were under Commission consideration, until a routine press release was issued just weeks before the Commission's publication of its Second Report and Order. In particular, interested parties had completely no knowledge with respect to the "grandfathering" provision in Section 74.1107 that is the very heart of the Commission's major market distant signal policy.

Furthermore, in light of the substantial public interest questions involved in the adoption of new rules to regulate an entire new industry, with the probability of serious disruption to property interests of existing CATV operations, the Commission's failure to provide interested parties a full hearing and opportunity for oral argument violated Section 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

An even more serious violation of due process marks the Commission's adoption of Section 74.1107 of the new rules in violation of Section 4(c) of the Administrative Procedure Act and contrary to all prohibitions against retroactive rule making. Section 74.1107, which prohibits the importation of "distant signals" by CATV systems not supplying these signals as of February 15, 1966, was in practical operation made effective more than a month prior to the date the new rules were first published in the Federal Register on March 17, 1966. Without specific statutory authority and contrary to Congressional policy embodied in the Administrative Procedure Act, and without considering the great disruption this rule would have upon

CATV systems that for many previous months had been making plans and commitments completely ignorant of any Commission intention to "grandfather CATV systems as of February 15th, the Commission's implementation of this rule retroactively is unlawful and the rule is invalid.

In any event, the Commission's Second Report and Order failed to show "good cause" for waiving the requirement of Section 4(c) of the Administrative Procedure Act that new substantive rules may be effective no sooner than thirty days after publication in the Federal Register. The Commission erroneously assumes the correctness of the February 15th "grandfather" date, fails to justify a waiver of Section 4(c) with specific facts, and ignores the massive disruption to existing CATV systems that the new rules would create. Thus "good cause" for making Section 74.1107 effective sooner than April 18, 1966 has not been shown.

Attempting to enforce the new rules against appellant, the Commission committed serious breaches of Buckeye's statutory and constitutional rights of due process. First, the Commission failed to provide Buckeye a full hearing on all facets of the public interest in the enforcement of untested and controversial rules upon appellant. Instead, it chose to consider only one issue, compliance with Section 74.1107. Buckeye's repeated attempts to enlarge the hearing were casually disregarded by the Commission. In so doing, and in refusing to consider any issue except appellant's alleged non-compliance with its rules, the cease and desist order issued against appellant is invalid. This Court has so held in a recent interlocutory order in a case pending before this Court based on substantially identical facts, *Booth American Co. v. FCC*, wherein this Court reaffirmed its holding in *C. J. Community Services, Inc. v. FCC* that a cease and desist order cannot be predicated on the naked finding that one of the Commission's rules has been violated if possible extenuating circumstances have not been considered.

In addition, the Commission ordered an expedited hearing schedule that denied Buckeye its statutory right to file exceptions to the hearing examiner's initial decision. Section 409 of the Communications Act permits this abbreviated schedule *only* when, upon the record of the instant proceeding, the Commission finds imperative circumstances for having the record immediately certified to the Commission for final decision. Contrary to this explicit provision, the Commission's finding of necessity for immediately certifying Buckeye's record to the Commission for final decision, without opportunity to file exceptions to an examiner's report, was not based upon the record of the instant proceeding. To the contrary, its alleged finding of necessity contained in the Order to Show Cause directed to Buckeye was made even before the record in the instant proceeding was begun.

As if these violations of due process were not enough, the Commission rushed appellant through an extremely unfair time schedule denying it full opportunity to prepare its case and denying it the opportunity to present oral argument before the full Commission. The unfairness of the "hearing" the Commission afforded Buckeye is too obvious to belabor and commends the full attention of this Court.

ARGUMENT

I.

The Commission's New CATV Rules, Particularly Section 74.1107, Are an Unconstitutional Infringement of Appellant's Rights Under the First Amendment.

Buckeye Cablevision, Inc. is engaged in the dissemination of meaningful information, by bringing into individual homes a wide assortment of high quality television signals. It is clear that its operations come within the scope of the First Amendment, as do other forms of business activities engaged in producing and distributing entertainment and information. Besides newspapers and magazines,

pamphlets, leaflets, and every sort of publication, *Lowell v. City of Griffin*, 303 U.S. 444 (1938), motion pictures and stage presentations, *Kingsley Int'l Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684 (1959), and radio and television, *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), are protected by the First Amendment.¹⁷ The Supreme Court has held that the First Amendment protects almost every aspect of communications, including "not only the right to utter and print, but the right to distribute, the right to receive, and the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

The Commission's new CATV rules abridge appellant's right to distribute information and entertainment free from governmental interference.¹⁸ They force appellant to carry certain signals (Section 74.1103(a)), require the non-duplication of other signals (Section 74.1103(e), (f)), and in effect preclude Buckeye from distributing all television signals available off-the-air (Section 74.1107). The discriminatory effect of Section 74.1107 is particularly onerous. While individual Toledo citizens are free to erect antennas capable of bringing them all television signals available off-the-air, Section 74.1107 precludes Buckeye from receiving and distributing to individual homes these same signals if they are received beyond the station's predicted Grade B contour.

Appellant concedes that the rights protected under the First Amendment are not absolute, but are subject to reasonable restrictions deemed sufficiently necessary in

¹⁷ It is clear that the First Amendment was intended to have a broad scope in order to insure the free communication and interchange of ideas. *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

¹⁸ In addition to violating the First Amendment, these rules contravene the censorship provisions of Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326.

the public interest. The crucial inquiry, therefore, is twofold: namely, whether there exists a substantial public interest that justifies a restriction upon the free reception of television signals; and, if so, whether in practical application the impact of these rules is no broader than necessary to achieve their legitimate objective.

A. *The Commission has failed to justify that new CATV rules are necessary in the public interest.*

The presence of a CATV system in a community does much to further the widest possible dissemination of information, which the Supreme Court has stated is "essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1 (1945). By receiving signals that it can pick up off-the-air and distributing them to its subscribers, Buckeye not only broadens the effective range of programming alternatives, but it maximizes the quantum of diverse and antagonistic opinion reaching the viewers.

In adopting the new CATV rules, the Commission justifies the restrictions they impose by stating that the uncontrolled growth of CATV will interfere with its carefully worked-out scheme of UHF and VHF frequency allocations.¹⁹ Specifically, the Commission fears that future CATV successes will fragmentize the viewing market to such an extent that market entry by new UHF stations will be inhibited. Certainly the development of unused UHF allocations is in the public interest. Appellant submits, however, that there is no factual basis for the fears the Commission has expressed regarding UHF development.

Rather than dampen UHF development, the presence of a CATV operator in a community does much to encourage the development of new UHF stations. A CATV system expands their viewing and advertising markets by making their signals available to subscribers whose television sets do not possess UHF capability, or who themselves

¹⁹Second Report and Order, §§ 113-30.

are unaware of its existence. Furthermore, many factors in addition to the presence or absence of a CATV system influence decisions to enter new UHF markets. Thus, when viewed in perspective, the Commission's proffered justification for its rules fails to overcome the "heavy presumption against its constitutional validity." *Freedman v. Maryland*, 380 U.S. 51 (1964).

B. The Commission's rules go far beyond their legitimate objective.

Even assuming that the Commission has demonstrated a sufficiently pressing problem affecting the public interest, the new rules have been written with such broad effect that they go completely beyond their alleged justification, *i.e.*, the orderly development of the Commission's frequency allocations.

The Supreme Court had made it clear that it is inconsistent with the spirit of the First Amendment to "contract the spectrum of available knowledge." *Griswold v. Connecticut*, *supra* at 482. Therefore, it is well-established that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberty when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

One effect of Section 74.1107 is the elimination of sources of knowledge and entertainment without the current prospect of any substitute therefor. The Commission alludes to the future development of UHF stations, but this does not remedy the immediate deprivation. Another effect of the rules is the elimination of CATV or a competitive factor in the broadcast industry. The benefits accruing to the general public as a consequence of healthy competition need no reiteration here. In this instance, CATV systems unhampered by the present restrictions would provide sufficient incentive for broadcasters to improve their programming quality. But at present these benefits are lost.

It is little comfort for the Commission to argue that Section 74.1107 is not an absolute restriction on the importation of distant signals, since the evidentiary hearing permitted under that section imposes such a heavy burden on petitioners²⁰ that the rule, in practical effect, approaches the total censorship recently struck down by the California Supreme Court in *Weaver v. Jordan*, 411 P.2d 289 (1966). In that case, the court held that a California statute purporting to ban all pay-TV in the state was unconstitutional in light of its effects upon appellant's right to distribute. The court was convinced that the statute in question would encourage monopolistic domination of television by existing stations, prohibiting the widest possible range and choice of ideas and of expression. The same serious effect on the public's right to free expression is an inevitable result of the Commission's unreasonable attempt to regulate CATV systems.

II.

Adoption of the CATV Rules Without Adequate Notice and Without Affording Interested Parties Adequate Opportunity to Participate in the Rule Making Violates Sections 4(a) and (b) of the Administrative Procedure Act and Due Process Guarantees of the Fifth Amendment.

The Commission's adoption of the new CATV rules contained in its Second Report and Order completed a rule making proceeding markedly short in concern for the constitutional due process and statutory guarantees that govern such actions. The new rules were issued without affording interested parties sufficient notice as to the nature of its proceeding and without allowing the public adequate opportunity to participate in the rule making proceeding.

Congress incorporated the due process guarantees of

²⁰ *Booth American Co.*, 5 F.C.C.2d 509, 519-20 (1966) (dissenting Opinion of Commissioners Bartley and Loevinger).

the Fifth Amendment into Section 4 of the Administrative Procedure Act,²¹ providing a set of procedural safeguards with which administrative rule making actions must comply, in order that adoption of new substantive rules would cause as little inconvenience to the public as possible and not accomplish a substantial taking of property in violation of the Fifth Amendment.

Section 4(a) of the Administrative Procedure Act provides that notice of the proposed rule making shall be published in the Federal Register and must include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." It is clear from the legislative history of this section that the notice issued by an agency in compliance with the mandate of Section 4(a) "must be sufficient to fairly apprise interested parties of the issues involved so that they may present responsive data or arguments relating thereto," and that "where notice is required it should be complete and specific...." ²²

Section 4(b) provides that after notice has been issued, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ." It is the intent of Sections 4(a) and (b) together to insure that the rule making process will maximize opportunities for interested parties to be on notice of and be able to effectively participate in rule making proceedings.

²¹ 5 U.S.C. § 1003.

²² S. Doc. No. 248, 79th Cong., 2d Sess. 200, 358 (1946).

A. Interested parties were not afforded adequate notice as required by Section 4(a).

The Notice of Inquiry given by the Commission in advance of adopting Section 74.1107 and the other new CATV rules falls so woefully short of meeting the minimum notice requirements guaranteed by Section 4(a) of the Administrative Procedure Act that the Commission's action in this case is completely lacking any valid statutory or administrative basis. Rule making actions are normally begun by the Commission's issuance of the text of its proposed rules, along with an invitation for interested persons to comment on these proposals. The Notice of Inquiry issued in advance of adoption of the new CATV rules, however, nowhere set out specific rules whose adoption was under consideration by the Commission. At best the vague and conflicting statement contained in the Notice of Inquiry led interested parties to believe that the Commission was considering the adoption of an interim policy in the non-microwave CATV area, to be followed by the issuance of a further notice of inquiry or rule making containing specific rule proposals.

(1) The public was led to believe that a further notice and opportunity to comment would precede the adoption of final rules.

The Notice of Inquiry questioned by appellant was divided into two main parts. Part I related to possible assumption of jurisdiction by the Commission over non-microwave served CATV systems, and the Commission's proposal to adopt the same rules with respect to these systems that had been previously adopted with respect to microwave served CATV systems in its First Report and Order. While the Commission stated that its case for jurisdiction was "a strong one," it was quick to point out that it "would carefully consider comments addressed to this aspect" and reiterated its view that clarifying legislation is necessary in light of the "new and important questions of policy and law in the communications field."

The Commission flatly stated that it had "no intention of by-passing Congressional action in this field."²³ The Commission's subsequent actions completely contradicted this premise.

Part II of the Notice of Inquiry was directed to broader questions involving both microwave and non-microwave served CATV systems for which the Commission desired to collect further information. These questions included the effect on independent UHF development and the effects of future CATV growth and penetration in the larger markets.

Numerous statements throughout the Notice of Inquiry show the Commission's complete dismissal of any intention to adopt final rules until after issuance of a further notice. For example, four open concessions to this effect are contained in Paragraphs 64 and 68:

- (1) "[T]he main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations." (¶64).
- (2) "In the absence of further information we do not have a sound basis for specific rule proposals." (¶64).
- (3) "A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission." (¶64).
- (4) "After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited...." (¶68).

Pending the completion of this additional inquiry and resolution of the question of jurisdiction, the Commission led the public to believe that it was considering the adop-

²³Notice of Inquiry, §§ 30-31.

tion of an interim procedure. This is clear from Paragraph 50 of the Notice of Inquiry, for example, where the Commission invited comments on what form of interim action might be appropriate with regard to the possible effect that new CATV systems would have on the development of UHF broadcasting.

Contrary to the above statements in its Notice of Inquiry, the Commission adopted final rules regulating non-microwave served CATV systems without issuing a further notice, specific rule proposals, or adopting an interim procedure. Clearly the public was misled by the bald promises of the Commission. Just as clearly, this lack of good faith is not tolerated under Section 4(a) of the Administrative Procedure Act and the Fifth Amendment.

(2) The Notice of Inquiry was not specific as to the terms and substance of the proposed new rules.

Section 4(a) of the Administrative Procedure Act insures that an agency's notice of proposed rule making will disclose the tenor and substance of proposed rules with a much greater degree of specification than did the Notice of Inquiry issued by the Commission back in April of 1965. The drafters of Section 4(a) intended to obligate each agency "to announce with the greatest possible definiteness" the matters under consideration.²⁴ In conflict with this goal, however, the Notice of Inquiry issued by the Commission was too vague, too contradictory and too incomplete to serve as adequate notice.

Perhaps the strongest evidence of notice deficiency is the wide disparity between the broad general matters of concern set forth in the Notice of Inquiry and the rules actually adopted in the Second Report and Order. For example, at no place does the Notice of Inquiry mention anything about establishing "grandfather" rights with

²⁴S. Doc. No. 248, 79th Cong. 2d Sess. 18 (1946).

respect to the importation of distant signals. When the new rules were issued, however, Section 74.1107 conferred "grandfather" rights on those CATV systems which on February 15, 1966 were supplying to their subscribers a television signal extended beyond its Grade B contour.

Specification as to the major substantive provisions of the new rules similarly was lacking. In regard to Section 74.1107 of the new rules, for example, the Notice of Inquiry made no mention of a standard based on the top 100 ARB markets,²⁵ nor did it state that the signal from a UHF station available off-the-air in a community beyond its predicted Grade B contour would be a prohibited "distant" signal.

In failing to give the public adequate notice with sufficient clarity as to the scope and nature of the Commission's intended proceeding, the public was deprived of a meaningful opportunity to participate effectively in the rule making proceeding. It is axiomatic, of course, that complete and specific notice is particularly essential in a case of this nature where there is an intent to assert authority over new areas. The Notice of Inquiry was so equivocal that it failed to convey clearly to the public what the Commission intended to do. It cannot serve as legal notice under Section 4(a), and it most certainly does not satisfy the due process requirement of the Fifth Amendment, particularly when affected parties such as appellant never were conscious of the immediacy of the threat to their property.

²⁵ In fact, dependence on a private commercial entity to measure market rankings is an unlawful and arbitrary delegation of agency power to a private concern, particularly when this concern has been so extensively criticized by the Commission in the past.

B. The Commission denied interested parties the right to participate effectively in the rule making proceedings.

An equally serious defect inherent in the rule making proceeding which culminated in the adoption of the Second Report and Order is the Commission's failure to afford appellant and others the full hearing contemplated by Section 4(b) of the Administrative Procedure Act and the Fifth Amendment. Of course, Section 4(b) does not compel a full evidentiary or oral hearing in every case of administrative rule making. But since the purpose of this section is to allow interested parties to participate effectively in rule making actions, the Commission has traditionally and consistently treated it as a mandatory requirement when considering matters of extreme importance.

Merely by way of example, the Commission determined that evidentiary proceedings and/or oral argument en banc were appropriate and necessary in the interest of sound decision-making in the following instances: (1) color television,²⁶ (2) television allocations,²⁷ (3) network practices,²⁸ (4) subscription television,²⁹ and (5) program service forms of broadcast stations.³⁰ Each of these matters involved important and basic issues seriously affecting the development of the communications industry. Each, like the CATV questions, involved serious factual disputes and conflicting policy recommendations. All parties, pro and con, agree that CATV is a new and dynamic element in the communications field.

²⁶ *First Color Television Report*, 1 Pike & Fischer RR 91:261 (1950).

²⁷ *Sixth Report on Television Allocations*, 1 Pike & Fischer RR 91:601 (1952).

²⁸ *Commission Policy on Programming*, 20 Pike & Fischer RR 1901 (1960).

²⁹ *Hartford Phonevision Co.*, 20 Pike & Fischer RR 737 (1960).

³⁰ *AM-FM Program Forms*, 5 Pike & Fischer RR 2d 1773 (1965).

In adopting the Second Report and Order, however, a hearing of comparable depth was not afforded interested parties. The Commission failed to publish specific rules in advance, denied interested parties the opportunity to introduce evidence orally and cross-examine witnesses,³¹ bypassed reference of the whole matter to a qualified hearing examiner for initial decision, and precluded oral argument before the full Commission on the examiner's recommendations. These procedural shortcomings were compounded when the Commission in issuing the new CATV rules, relied on contradictory data and speculative conclusions from the written comments as a basis for its Second Report and Order. Nowhere did the Commission permit a full hearing that would have exposed the many weaknesses contained in these written comments, nor oral argument and cross-examination to test the various theories, nor the opportunity to comment on specific rule proposals.

The absence of oral argument prior to adoption of the new CATV rules, in light of the highly conflicting comments³² and the substantial public policy issues raised by that proceeding, deprived Buckeye and other interested parties of the full hearing envisioned by Section 4(b) of the Administrative Procedure Act and protected by the Fifth Amendment. Appellant recognizes that "the right of oral argument as a matter of procedural due process under the Fifth Amendment varies from case to case in accordance with differing circumstances" *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275 (1949). But when the Commission seeks to adopt new rules depriv-

³¹ *Morgan v. United States*, 304 U.S. 1 (1938).

³² The myriad of written comments submitted to the Commission were diametrically opposed in both factual content and argument, and the Commission's reasoning in the Second Report and Order depended in large degree on assumptions and speculations as a substitute for facts. See Separate Statement of Commissioner Loevinger, Second Report and Order.

ing CATV systems of substantial property or property rights, and important and bitterly contested issues of public policy have been raised, then fair play requires that interested parties be given the right to present their views orally. *Standard Airlines v. CAB*, 85 U.S. App. D.C. 29, 177 F.2d 18 (1949). See also *L. B. Wilson v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948) (reversing Commission grant of application for construction permit).

It is clear that this Court stands ready to insure that the right to oral argument is protected "in advance of the adoption of controversial regulations governing competitive practices," even if not specifically required by statute, when "deemed inherent in the very concept of fair hearing." *American Airlines, Inc. v. CAB*, ___ U.S. App. D.C. ___, 359 F.2d 624, 632 (1966). As this Court pointed out in the *American Airlines* case, administrative flexibility demands reliance on the good faith of agencies not to dispense with hearings prior to the adoption of controversial rules. *Ibid.* Thus when agency good faith fails, due process protects the rights of the public.

Decisions of this Court consistently have recognized the need for oral testimony and "live" witnesses in Commission proceedings of far-reaching policy importance where property is being taken or destroyed. See, e.g., *Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965) (abuse of discretion not to hold hearing on issue of common ownership of local television station and CATV system); *Clarksburg Publishing Company v. FCC*, 96 U.S. App. D.C. 211, 225 F.2d 511, 516-17 (1955) (full hearing required on issue of concentration of control). The need for a full evidentiary hearing is particularly important when, as here, many public policy issues are in question. *Louisiana Television Broadcasting Corp. v. FCC*, 121 U.S. App. D.C. 24, 347 F.2d 308 (1965) (reversing a Commission grant modifying a construction permit). While the above-cited cases dealt with specific license or consent actions, it would

appear clear that the basic reasoning of the Court applies equally to the broad policy questions involved in the Commission's adoption of the Second Report and Order.

Therefore, the new rules are invalid in that they were adopted without adequate advance notice and without affording interested parties sufficient opportunity to participate in their formulation.

III.

Section 74.1107 Is an Unlawful Retroactive Rule and Was Adopted in Violation of the Thirty Day Publication Requirement of Section 4(c) of the Administrative Procedure Act.

An even more serious violation of due process, orderly rule making procedures, and Section 4(c) of the Administrative Procedure Act marks the Commission's attempted retroactive application of Section 74.1107 of the new CATV rules.

The mandate of Section 4(c) is clear. It specifies that new substantive regulations cannot be made effective until thirty days after publication of the full text of the rules in the Federal Register, except where "good cause" for an earlier implementation is shown. Normally, therefore, Section 74.1107 would be effective on April 18, 1966. With a strong showing of "good cause," the Commission could have chosen not to wait the full thirty days, and instead could have made this rule effective any time sooner than April 18, 1966, up to the date of publication on March 17, 1966.

In adopting the Second Report and Order, the Commission allegedly made Section 74.1107 effective "immediately upon publication in the Federal Register."³³ But in practical operation, the Commission has made Section 74.1107 effective not upon publication (March 17th), but upon the date on which "grandfather" rights are pegged

³³Second Report and Order, ¶ 156.

(February 15th).³⁴ The Commission readily admits that "the effectiveness of our action, practically speaking" is geared to February 15th.³⁵ Thus the Commission has implemented Section 74.1107 before the rule was written, more than a month before the rule was first published in the Federal Register (March 17th), and a full sixty-two days prior to when the rule normally would have taken effect under Section 4(c) (April 18th). This is plainly an attempt to impose a retroactive regulation, clearly violative of basic administrative law, and clearly contrary to Section 4(c) which even upon a showing of "good cause" makes the earliest possible date for implementing a new rule the date of publication.

A. The attempted retroactive application of Section 74.1107 is unlawful.

Any rule which applies to events occurring prior to the date on which the rule is adopted is strongly disfavored and permitted only in the most extraordinary cases. Generally, "retroactive rules should be tolerated only when specifically authorized by statute." 1 *Davis, Administrative Law* 341 (1958). See, e.g., *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry.*, 284 U.S. 370, 389-90 (1932); *Litton Industries v. Renegotiations Bd.*, 298 F.2d 156 (4th Cir. 1962); *Blau v. Hodgkinson*, 100 F.Supp. 361, 371-74 (S.D. N.Y. 1951). Certainly nothing in the Communications Act gives statutory authority for the Commission to adopt retroactive rules regulating CATV systems.

³⁴ Except as to systems already supplying a community in the top 100 ARB markets, on February 15th, with a signal extended beyond its predicted Grade B contour, Section 74.1107 prohibits the importation of "distant signals", except after an evidentiary hearing and determination of the public interest. To date, there has been no "evidentiary hearing" ordered by the Commission in any instance.

³⁵ Second Report and Order, ¶ 147.

The odium of a retroactive rule derives from the great inequity caused to innocent parties who altered their positions in reliance upon the absence of a rule. As the large number of petitions for waiver of Section 74.1107 which have been filed to date so graphically demonstrate, the hardship imposed on the parties involved is completely disproportionate to the end which the Commission is seeking to accomplish. Courts are quick to strike down the application of a retroactive rule when the hardship it creates is altogether out of proportion to the public ends to be accomplished. See, e.g., *NLRB v. E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), *cert. denied* 366 U.S. 908 (1961); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

Congress specifically expressed its disapproval of retroactive rules when it passed the Administrative Procedure Act. Section 3(a)(3) of the Act, 5 U.S.C. § 1002(a)(3), requires publication in the Federal Register of all substantive rules before they may have the force and effect of law. Rule making actions must comply with Sections 4(a) and (b), plus thirty day publication in the Federal Register under Section 4(c). The Commission erred when it departed from all of these requirements in the procedures it followed in the present case.

The attempt to implement these new rules in this fashion violates the basic purposes of both the Administrative Procedure Act and the Federal Register Act.³⁶ Courts have repeatedly stated that these are more than mere record acts. Particularly must the publication requirements be strictly complied with when violations of the regulations in question may involve, as they do here, potential criminal penalties.

The Commission at no place has documented in sufficient detail what exceptional circumstances it feels

³⁶ 44 U.S.C. § 307.

justify the retroactive application of Section 74.1107. Throughout the proceeding below, from which Buckeye has taken the instant appeal, appellant repeatedly challenged the "grandfather" provision of Section 74.1107.³⁷ The Commission's hasty response to these attacks, in ordering Buckeye to cease and desist,³⁸ was merely that it has previously covered this subject in the Second Report and Order, and in the Memorandum Opinion and Order, issued the same day as the order to Buckeye to cease and desist, which denied seven petitions for stay of the effective dates of the Second Report and Order.³⁹

The Commission's justification for the "grandfather" provision, however, consists of only vague, conclusionary statements completely unsupported by specific factual allegations, which may be summarized as follows:

(1) Significant public interest questions are raised by the presence of CATV operations in major television markets;

(2) It is essential that these operations be examined before they become well established, since subsequently the Commission would have difficulty in taking effective action if it should determine a CATV system is operating inconsistent with the public interest.

(3) It is necessary to establish a cut-off date that will preclude the commencement of new operations and extraordinary efforts to beat any proposed deadline.

³⁷ Petition to Clarify or Enlarge Issues (R. 23-24); Petition for Reconsideration and Consolidation (R. 40); Brief of Buckeye Cablevision, Inc. (R. 238-47). In addition, Buckeye challenged this provision in a Petition for Reconsideration of the Second Report and Order, Docket No. 15971, filed March 25, 1966.

³⁸ 3 F.C.C. 2d 801.

³⁹ (R. 357-72) (hereinafter cited Memorandum Opinion and Order).

(4) Therefore, it is reasonable to "grandfather" CATV systems in operation back on February 15th, the date a press release was first issued announcing in general terms the Commission's agreement on major market policies.⁴⁰

Clearly, a convincing showing of necessity supported by detailed factual allegations is completely absent in the Commission's justification for retroactively applying Section 74.1107. For example, the Commission did not have before it any facts concerning how many CATV systems would be affected, how much disruption of service would be caused by making Section 74.1107 effective retroactively, or what financial expenditures had been made and contractual obligations incurred by CATV systems prior to their first knowledge (on February 15th) that "grandfather" rights would be afforded as of that date. Nor did the Commission balance in any way the inconvenience and cost that would devolve upon CATV systems by retroactively applying Section 74.1107, as compared to the possible public harm if this new rule was not so applied. In fact, the Commission admitted the absence of sufficient facts when it adopted the Second Report and Order, but it felt that by freezing the situation as it was as of February 15th would enable it or the Congress thereafter to define the public interest "upon the basis of adequate knowledge."⁴¹

Nor can the Commission argue that interested parties have known about the "grandfather" provision long before the rules were first published on March 17, 1966. As appellant has previously pointed out, the Commission's April 1965 Notice of Inquiry completely failed to give any specification with respect to the major substantive rules

⁴⁰ Second Report and Order, ¶¶ 147-48; Memorandum Opinion and Order, ¶¶ 12-20 (R. 362-65).

⁴¹ Second Report and Order, ¶ 148.

the Commission had under consideration. The first inkling regarding the specific content of those rules did not come until the Commission's February 15, 1966 press release. Only then was the public, for the first time, apprised that "grandfather" rights would be incorporated into the new rules, and only on March 17th, when the new rules were first published were interested parties actually put on notice as to the content of Section 74.1107.

B. No convincing showing of "good cause" has been made to waive Section 4(c), and thus Section 74.1107 may not be made effective sooner than thirty days after publication. Even if "good cause" is shown the rule cannot be effective until published.

The Commission has failed to show "good cause" for waiving the requirement of Section 4(c) of the Administrative Procedure Act that new rules will not be effective until thirty days after publication in the Federal Register. Even if this Court should find that the Commission has adequately shown "good cause" for waiving Section 4(c), Section 74.1107 cannot be made effective any sooner than the day on which it was first published in the Federal Register (March 17th), and not on February 15th as the Commission has attempted.

It is clear that the good cause exception in Section 4(c) should be used only in "extremely urgent situations." *St. Joseph Stock Yards Co.*, 6 A.D. 319 (Dept. Agric. 1947) (milk marketing order). See, e.g., *Dighton v. Coffman*, 178 F. Supp. 114 (E.D. Ill. 1959) (acreage quota change immediately prior to plant season). Or where notice is unnecessary, there is little reason not to waive the thirty day requirement of Section 4(c). See, e.g., *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D. N.Y. 1953), *aff'd*, *Mitchell v. Edward S. Wagner Co.*, 217 F.2d 303 (1954), *cert. denied*, 348 U.S. 964 (1955) (long-standing industry compliance with rule and knowledge on part of plaintiff). The Commission itself has used the exception

sparingly, and only to serve immediate needs of the national security and defense. *Reallocation of Frequencies*, 17 RR 1587 (1959).

Nowhere has the Commission made a convincing showing of "good cause" to support the attempted waiver of Section 4(c). The Commission's attempted demonstration of "good cause" erroneously assumes both the wisdom and necessity of establishing "grandfather" rights as of February 15, 1966. The Commission asserts that it would be foolish for it passively to wait for the thirty day period to expire, and then take action with great inconvenience and disruption against systems which commenced operations after the "grandfather" date. Its argument is simply "good cause" to waive Section 4(c) necessarily exists because we have decided upon February 15th for "grandfather" rights.⁴² Since Buckeye previously has demonstrated that the alleged showing of necessity is insufficient to justify the "grandfather" provision (Brief pp. 27-30), it is similarly insufficient to serve as "good cause" for waiving Section 4(c).

Furthermore, the Commission's attempted demonstration of "good cause" is completely lacking in detailed facts upon which the Commission could rely in waiving the requirements of Section 4(c). Instead, the Commission seems to have relied upon purely unfounded speculation as to the grave consequences that would ensue if Section 74.1107 was not made effective upon publication and applied retroactively to February 15th, as is clearly pointed out in the dissent of Commissioner Bartley to the issuance of a cease and desist order against Buckeye below.⁴³

⁴² Second Report and Order, ¶ 147; Memorandum Opinion and Order, ¶ 21 (R. 366).

⁴³ 3 F.C.C. 2d 806-07. See also Commissioner Bartley's dissent, in which Commissioner Loevinger joins, in a similar cease and desist order issued against the Booth American Co., 5 F.C.C. 2d at 519-20 (July 13, 1966).

On the other hand, it appears that no consideration was given to the massive disruption to developing enterprises such as Buckeye, involving substantial investments and commitments of capital. All of these commitments and expenditures were made over extended periods of time during which the Commission has followed an uncertain and circuitous route, even as to its view of jurisdiction over off-the-air systems, for which legislative authority is still being sought while appeals on this point are pending.

IV.

Buckeye's Constitutional and Statutory Rights to a Full and Fair Hearing Were Violated, and Therefore the Commission's Cease and Desist Order Is Invalid.

A. The cease and desist order is invalid since the Commission refused to consider public interest considerations weighing against issuance of such an order.

The so-called "hearing" that Buckeye was afforded demonstrates the striking arbitrariness with which the Commission has proceeded against appellant. The Order to Show Cause issued pursuant to Section 312(c) of the Communications Act⁴⁴ directed "that there is only one issue to resolve, *i.e.*, compliance with the rules [Section 74.1107]." (R. 3). Time and time again Buckeye attempted, each time unsuccessfully, to enlarge the scope of the hearing to permit a full exploration of the public interest in the application of untested rules to appellant.⁴⁵

⁴⁴ Section 312(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(c).

⁴⁵ On April 18, 1966 Buckeye filed with the Commission a Petition to Clarify or Enlarge Issues, specifically setting forth what additional issues should have been included. (R. 17-38). This petition has never been acted upon. On the same date it filed a Petition for Reconsideration and Consolidation, in part requesting the Commission reconsider the limited scope it intended to

Since the legality of the new CATV is pending final determination in Congress and the courts, the various pleadings filed by Buckeye questioned the wisdom of enforcing these rules by the immediate issuance of a cease and desist order, unless the Commission undertook a broader inquiry into all facets of the public interest. In particular, Buckeye cited the irreparable injury it would suffer if prohibited from carrying any "distant signals"; the substantial efforts it had made and financial obligations it had undertaken in order to bring CATV to Toledo, prior to any Commission decision prohibiting importation of "distant signals" not being supplied on February 15, 1966; the public interest of the citizens of Toledo in a wide variety of television programs; and the questionable procedural steps taken by the Commission in adopting the Second Report and Order. None of these important issues was ever considered by the Commission.

In refusing to consider the facts and circumstances spelled out above which possibly extenuate Buckeye's actions, the Commission may not, as it did here, predicate a cease and desist order on the naked finding that one of its rules has been violated. This is the clear holding of this Court in its recently released memorandum opinion in granting a stay of the Commission's cease and desist order in a proceeding similar to the instant case. *Booth American Co. v. FCC*, No. 20,367, p. 5 (Sept. 16, 1966). While this Court recognized the legitimate interest of the Commission in stopping CATV extensions pending consid-

give the hearing and in part requesting that if the Commission should fail to reconsider its Order to Show Cause, then the issues raised by Buckeye's Petition for Declaratory Rule, for Waiver or Other Appropriate Relief (filed March 25, 1966 in Docket No. 15971) should be consolidated for hearing with the show cause proceeding. (R. 39-63). Favorable action on this petition was denied on April 27, 1966. (R. 91-92). Buckeye again protested at both the prehearing conference (Tr. 6-8) and its hearing (Tr. 50) the unreasonably limited nature of the hearing it was to receive.

eration of the problem on the merits, it directed that this could be done only on a logical basis after considering possible extenuating circumstances. *Booth American Co., supra.*

The Court's opinion reaffirmed its previous holding in *C. J. Community Services, Inc. v. FCC*, 100 U.S. App. D.C. 379, 246 F.2d 660 (1956), "that a cease and desist order may not be predicated on the finding of a violation if the Commission has refused to consider the facts and circumstances possibly extenuating the respondent's actions." *Booth American Co., supra.* In the *C. J. Community Services* case, *supra* at 383, 246 F.2d at 664, this Court clearly pointed out that Section 312(c) of the Communications Act permits the Commission to issue a cease and desist order *only* after it has weighed the circumstances against issuing such an order. The Commission has not complied with this statutory mandate.

Furthermore, due process requires that agency determination in the nature of an adjudicatory hearing affecting private legal rights be based upon a full evidentiary hearing, involving all aspects of the public interest. *Morgan v. United States*, 304 U.S. 1 (1937); *Philadelphia Co. v. SEC*, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948). The Commission previously has given effect to this requirement of due process. For instance, in the *Evansville Deintermixture Case*,⁴⁶ a full hearing was provided on the Commission's proposal to modify the license of station WTVW. In both modification proceedings as the above case, and in cease and desist proceedings as here, the Communications Act contemplates that a full hearing will be given to parties who may suffer injury upon conclusion of the show cause hearing.⁴⁷ But here the Commission

⁴⁶ 15 Pike & Fischer RR 1573 (1957).

⁴⁷ There is virtually no distinction between the order to show cause required by Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316, to be issued in advance of a modification proceeding, and the order to show cause that Section 312(c) requires in advance of an order to cease and desist.

foreclosed itself from passing on all the circumstances significant to a determination of the public interest.⁴⁸ For this reason alone the cease and desist order cannot stand.

B. Without finding upon the record necessity for waiving Buckeye's statutory right to file exceptions to an initial decision, and in rushing Buckeye through an expedited proceeding, the Commission denied appellant a full hearing.

The expedited hearing procedure ordered by the Commission was apparently taken pursuant to Section 409 of the Communications Act.⁴⁹ This statute specifies that upon conclusion of a hearing an initial decision will be issued by the hearing examiner, and that exceptions to the initial decision shall be permitted, except (as provided in Section 409(a)) where the hearing examiner is unavailable,

"or where the Commission *finds upon the record* that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision." (Emphasis supplied). 47 U.S.C. § 409(a).

The "record" upon which a finding of necessity must be

⁴⁸In fact, the language of Chairman Hyde's concurring opinion in the *Booth American Co.* case, 5 F.C.C. 2d at 519 makes it clear that in ordering both Booth American and Buckeye to cease and desist, the Commission has not reached a determination of the public interest based upon consideration of the full factual record.

⁴⁹Section 409 of the Communications Act of 1934, as amended, 47 U.S.C. § 409, which is a general provision relating to the conduct of all adjudicatory proceedings designated for hearing. A similar provision in Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 1007(a), is applicable only to rule making and licensing, neither of which is involved in this cease and desist case. Nevertheless, appellant invites attention to this Court's recent finding that the Commission fully complied with Section 8(a) by issuing a tentative decision in place of the examiner's report. *American Trucking Associations, Inc. v. FCC*, No. 19427, p. 24 (Sept. 15, 1966).

predicated is defined in Section 7(d) of the Administrative Procedure Act as the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding . . .". This is to constitute "the exclusive record for decision."⁵⁰

In proceeding against Buckeye, however, the Commission acted in flagrant violation of these requirements. The Order to Show Cause issued on March 25, 1966, the first entry in the record of this case, directed that upon closing the record the hearing examiner shall immediately certify the record to the Commission for final decision (R. 3). Thus the Commission found necessity for an expedited proceeding against Buckeye based *not* "upon the record" as required by Section 409(a), but based upon its arbitrary prejudgment *even before the record was begun*. The Commission cannot satisfy the statutory mandate by basing its finding upon the conclusions it reached in the Second Report and Order, which is part of a completely different record from the instant proceeding. This patent violation of the specific statutory requirements clearly is unlawful and compels this Court to set aside the Commission's order. *Channel 16 of Rhode Island, Inc. v. FCC*, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956).⁵¹

Where the Commission, however, has found upon the actual record of a proceeding imperative circumstances requiring omission of an initial decision and opportunity to file exceptions thereto, this Court has affirmed the Commission's subsequent order. See, *e.g.*, *RCA Communications, Inc. v. FCC*, 99 U.S. App. D.C. 163, 238 F.2d

⁵⁰ 5 U.S.C. § 1006(d).

⁵¹ In the *Channel 16* case the procedure adopted by the Commission did not provide for the hearing examiner's initial decision to which exceptions could be filed. The Commission at no place justified this because of the hearing examiner's unavailability or a finding upon the record of necessity for an expedited proceeding, as required by both Section 409 of the Communications Act and Section 8 of the Administrative Procedure Act.

24 (1956), *affirming MacKay Radio & Telegraph Co.*, 8 Pike & Fischer 1174 (1955), *cert. denied*, 352 U.S. 1004 (1957). There the finding of necessity was based on the extensive record developed through the course of eight years of Commission and court proceedings, which furnished the Commission with "a detailed analysis of all phases of the issues involved."⁵²

The contrast between the extensive record relied upon in that case, and the complete absence of a record in the present case, makes one wonder how the Commission's decision below can term its use of Section 409(a)'s expedited procedure "manifestly proper" and in fact cite the *RCA* case.⁵³ Nor is there any support in the Commission's citation of *American Colonial Broadcasting Corp.*⁵⁴ In that case an expedited hearing was ordered only after extensive formal conferences and a full evidentiary hearing had been held. Contrary to the Commission's misplaced reliance on these two cases, they only emphasize further the supreme departure from statutory standards and the Commission's own customary practices attempted herein.

Had the Commission waited until after Buckeye's hearing was completed, and then based upon the pleadings and evidence developed thus far found necessity for immediately certifying the record to the Commission for final

⁵² *Mackay Radio & Telegraph Co.*, 8 Pike & Fischer RR 1174, 1176 (1955). In 1946 and 1947 Mackay filed applications to establish radiotelephone circuits. A hearing was held, an initial decision was issued, exceptions were filed, followed by Commission grant of the applications. This Court reversed the grant, but on certiorari the Supreme Court reversed that decision and remanded the case to the Commission. Upon remand the Commission held oral argument, conducted further hearings, and only then omitted a further initial decision and instead issued a final decision.

⁵³ 3 F.C.C.2d 70.

⁵⁴ 6 Pike & Fischer RR 2d 377 (1965).

decision, then statutory authority for an expedited proceeding might have been present. Instead, the course it adopted here in advance of even the start of the record denied Buckeye its statutory right that an initial decision by the examiner be issued with opportunity for filing of exceptions prior to the Commission's final decision.

In two other respects the Commission denied appellant the full hearing required by procedural due process.⁵⁵ First, the extremely restrictive time schedule adopted by the Commission⁵⁶ in a case involving so many novel and complex issues prevented Buckeye from adequately preparing and presenting its case. See *Brahy v. Federal Radio Commission*, 61 U.S. App. D.C. 204, 59 F.2d 879 (1932). When an agency combines the functions of prosecutor and judge, it must be especially careful to insure a full and fair hearing. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

Nor can the Commission dismiss Buckeye's legitimate request for oral argument with such careless abandon as it did below in saying "no useful purpose" could be served in granting appellant's request.⁵⁷ Contrary to the Commission's holding, this Court has fully recognized that oral argument is an essential element of due process and helps insure to interested parties the full and fair hearing protected by the Fifth Amendment. *Philadelphia Co. v. SEC*, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948); *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948).

In light of the Commission's failure to insure Buckeye its constitutional and statutory right to a full hearing on all public interest questions, its right to file exceptions to an initial decision, and its right to oral argument and

⁵⁵ *Morgan v. United States*, 304 U.S. 1 (1937).

⁵⁶ Buckeye was given only the statutory minimum thirty days to prepare for hearing and a bare seven days for submitting written briefs.

⁵⁷ 3 F.C.C.2d 804.

reasonable time to prepare its case, the Commission's cease and desist order issued against appellant is invalid.

CONCLUSION

The Commission's order requiring appellant to cease and desist from carrying the signal of television station WJIM-TV is invalid, since the hearing afforded appellant denied it due process of law and since the rules upon which this hearing was ordered were adopted in violation of constitutional and statutory standards governing rule making procedures.

Therefore, this Court should reverse the Commission's Cease and Desist Order directed against appellant and remand this case to the Commission for further proceedings consistent with this Court's opinion.

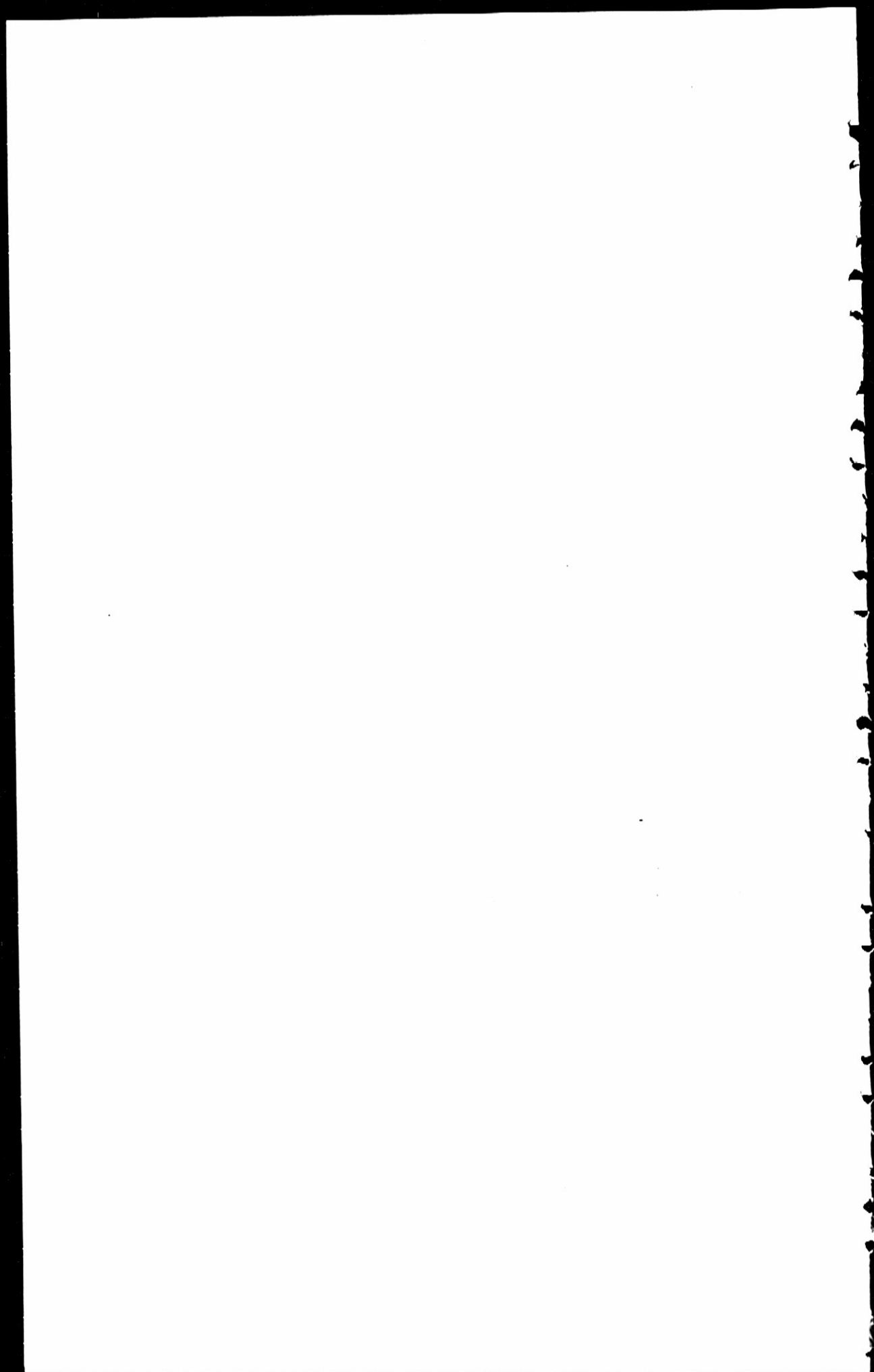
Respectfully submitted,

Robert A. Marmet
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Washington, D. C. 20036

Counsel for Appellant

September 26, 1966



APPENDIX

STATUTES AND COMMISSION RULES INVOLVED

Administrative Procedure Act § 4, 5 U.S.C. § 1003.

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the

agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

* * *

Sections 312(b), (c) and 409(a), (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(b), (c); 409(a), (b).

ADMINISTRATIVE SANCTIONS

Sec. 312.

* * *

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon

said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

* * *

General Provisions Relating to Proceedings— Witnesses and Depositions

Sec. 409. (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any to whom the function of passing upon the exceptions is delegated under section 5(d)(1): *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

* * *

Section 74.1101(i) and Section 74.1107 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1101(i), 74.1107.

§ 74.1101 Definitions.

* * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the

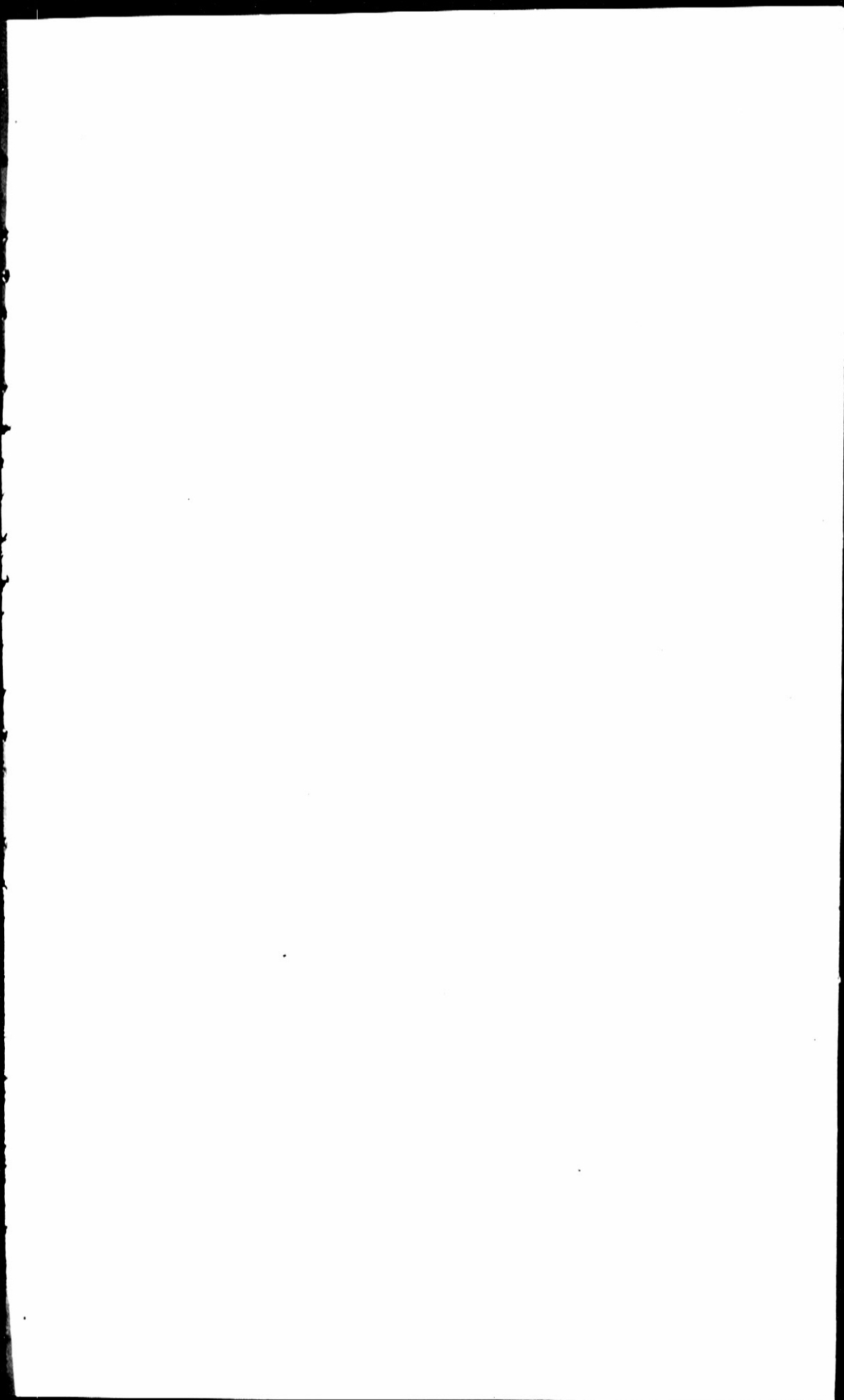
public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of

App. 6

the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.



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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

706

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING CO., and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

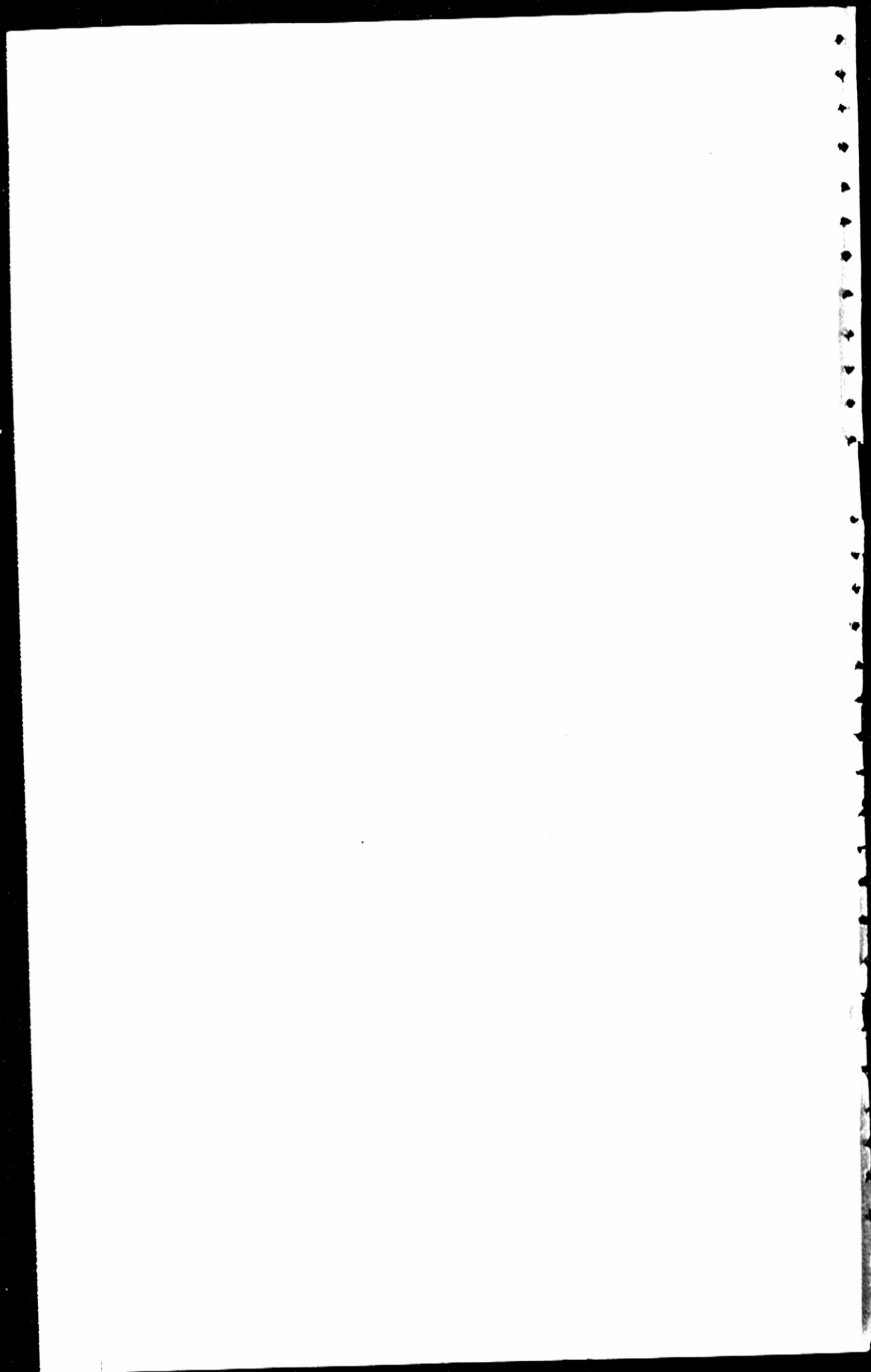
APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

VOLUME I

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 12 1966

Nathan J. Paulson
CLERK



(i)

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NOTICE OF INQUIRY AND PROPOSED RULEMAKING RE ALL CATV SYSTEMS, DOCKET No. 15971:

Requests that the Commission assert jurisdiction of TV signals by CATV's and promulgate rules and regulations governing such distribution; granted in part.

Inquiry and rulemaking directed toward all CATV systems; instituted.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PARTS 21, 74 (PROPOSED SUB-PART J), AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS

Docket No. 15971
(RM Nos. 636, 672,
742, 755, and 766)

NOTICE OF INQUIRY
and
NOTICE OF PROPOSED RULEMAKING

(Adopted April 22, 1965)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS.

1. Notice is hereby given of inquiry and proposed rulemaking in the above-entitled matter.

2. The Commission has received a number of requests that it assert jurisdiction over the distribution of television broadcast signals by community antenna television systems (CATV's) and promulgate rules and regulations governing such distribution. Many of these requests were made informally in comments on the rulemaking in dockets Nos. 14895 and 15233 with respect to the licensing of microwave facilities used to relay television signals to CATV systems.¹ In addition, five formal petitions have been filed.²

3. (a) On October 16, 1964, the American Broadcasting Co. (ABC) filed a "petition for Commission regulation of the carriage of television signals by Community Antenna Television Systems," requesting the Commission to promulgate rules establishing areas and zones to be served by television stations and limiting the use of the

¹ The following specifically requested that the Commission assume jurisdiction over all CATV's: Aroostook Broadcasting Corp., Association for Competitive Television, Channel Seven, Inc., and WLUC-TV. Other parties filing comments indicated that they held the same views.

² Similar petitions have also been received from Capital Cities Broadcasting Corp. (RM-755, filed on Apr. 7, 1965) and Taft Broadcasting Co. (RM-766, filed on Apr. 13, 1965). Any further petitions of this nature will be placed in this docket and treated as comments.

stations' signals beyond such areas and zones (RM No. 672). Various pleadings in support of, or opposition to, the ABC petition have been submitted, and ABC has filed a reply; (b) on December 18, 1964, Springfield Television Broadcasting Corp. (Springfield), filed a "request for declaratory ruling" that all CATV systems, whether utilizing microwave facilities or acquiring television signals off-the-air, are subject to the Commission's jurisdiction and required to comply with operating provisions similar to those proposed in dockets Nos. 14895 and 15233; (c) on January 22, 1965, Boise Valley Broadcasters, Inc., licensee of station KBOI-TV, Boise, Idaho (Boise), filed a "petition for interim relief," requesting the Commission to assume complete jurisdiction over all CATV systems and impose a "freeze" on all microwave applications for CATV use pending the promulgation of rules governing all CATV systems; (d) on February 12, 1965, Westinghouse Broadcasting Co., Inc., filed a "petition for consolidation of proceedings and assertion of jurisdiction over Community Antenna Television Systems," requesting the Commission to institute rulemaking governing all CATV systems, consolidate that proceeding with dockets Nos. 14895 and 15233, and stay immediately operations by CATV's in those areas which now or in the near future will be served by three commercial television stations pending the adoption of final regulations; (e) on March 10, 1965, the Association of Association of Maximum Service Telecasters, Inc. (AMST), filed a "petition of Association of Maximum Service Telecasters, Inc., for rulemaking" (RM-742), calling for the immediate exercise of regulatory authority by the Commission over all CATV systems and the adoption of comprehensive rules of general applicability.^{2a} The stated bases of the five petitions are summarized below.

4. (a) *The ABC petition.*—ABC petitions the Commission to regulate the distribution of television signals by CATV systems on the ground that such action is essential to our ability to discharge statutory responsibilities and within the Commission's present authority. ABC urges that the present and likely future trend of CATV development threatens to undercut the discharge of our statutory responsibilities "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service" (sec. 1 of the Communications Act, 47 U.S.C. 151), equitably apportioned "among the several States and communities" (sec. 307(b), 47 U.S.C. 307(b)).

5. In support of the claim of increasing CATV impact upon Commission and statutory policies, ABC points to major changes in CATV operations since the Commission's 1959 report and order in docket No. 12443, "In the Matter of an Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting," 26 F.C.C. 403, 18 Pike & Fischer, R.R. 1573. According to ABC, the number of CATV systems has grown from approximately 550, serving an estimated 1,500,000 viewers, to approximately 1,300 CATV systems

^{2a} Thirteen dissenting members of AMST have filed comments expressing a contrary position.

serving over 4 million viewers. Moreover, CATV franchises, sought or granted, have been running at the rate of one a day during the last 10 months, in 345 communities in 40 States. Whereas the number of channels offered to CATV subscribers was typically three in 1959, the emphasis now is on broadband systems with a capacity for 11 or 12 channels. In 1959, CATV operations were largely confined to small, or fairly small markets; today there are plans to extend New York City stations to substantial communities many miles away in upstate New York and Pennsylvania. Predicting that the next step will be for CATV to bring New York City independent stations into major cities like Boston, Philadelphia, Baltimore, and Washington, ABC expresses fear that this might lead to combined CATV and pay-TV operations which would siphon off top attractions from free TV.

6. Before summarizing the further bases for ABC's claim of adverse impact, we note in this connection that two UHF permittees in Philadelphia have expressed concern over the effect of pending CATV applications for franchises in that city. William Fox, permittee of a new UHF station, WIBF-TV, which expects to commence operation in Philadelphia in mid-1965, filed a statement supporting the ABC petition and commented *inter alia* as follows:

As set forth in the ABC petition, there are now several applications pending for CATV franchises in Philadelphia. The successful operation of UHF station WIBF-TV in Philadelphia, which now has three operating VHF stations, will be dependent on its ability to bring outstanding programming not now available to the Philadelphia audience and on adequate protection of this programming from uncontrolled carriage of signals from other markets by CATV systems serving Philadelphia. Unregulated carriage of television signals by CATV systems in Philadelphia will prevent implementation of the Commission's basic television allocation policy which looks toward the operation of UHF and VHF stations in intermixed markets throughout the United States.

In addition, ABC points out that the permittee of UHF station WPHL-TV, which has suspended operation in Philadelphia but plans to go back on the air in mid-1965, wrote a syndicated film supplier on December 10, 1964, as follows:

As you may know, a great deal of CATV activity has emerged in Philadelphia and vicinity. Rollins Broadcasting has just been granted an exclusive franchise for Wilmington, Del. Jerrold Electronics has applied for Camden, N.J.; and more than a half dozen applicants are seeking franchises for Philadelphia, including Triangle, Storer, the Bulletin Co., etc. All proposed systems would be operating within our principal coverage area. Their main offering is to be the programming of WNEW-TV, WOR-TV, and WPIX. The New York indies may represent damaging competition to Philadelphia UHF stations should their programming be admitted to this market. We, therefore, must ask that any film purchase permit WPHL-TV options for cancellation, without penalty, in the event the same film shows are available from New York indies via local cable systems. I am sure you will understand that this measure is a necessity.

7. The ABC petition notes further that the enactment of the all-channel receiver law in 1962 (76 Stat. 150, 151) has committed Congress and the Commission to a long-range television plan in which the expanded use of UHF will be paramount, and asserts that unregulated CATV poses a substantial threat to UHF development. By way of example, ABC notes that a Binghamton, N.Y., UHF station, in oper-

ation since 1957, has recently advised the Commission that UHF service would terminate there (leaving the city with one VHF station in place of one VHF and two UHF) if CATV were permitted to bring in four New York City independent stations. ABC also points to applications for CATV franchises in a number of Connecticut towns where UHF channels are either in use or allocated, noting that the CATV's propose to bring in New York City stations as well as others. ABC further lists 70 communities with UHF allocations where CATV franchises were sought between August 21 and November 26, 1964, and 95 communities with UHF allocations where CATV franchises were granted during the same period.

8. In addition to the impact on UHF, ABC urges that unregulated CATV has had, and will have, substantial adverse effect on service by local television stations, since the splitting of audience resulting from a multiplicity of additional signals brought in by CATV inevitably causes the station to lose audience and advertising revenues. ABC claims that the rulemaking in dockets Nos. 14895 and 15233 is wholly inadequate to insure that local television service can survive effectively, and that CATV cannot be an adequate substitute for local television broadcast service for three reasons: "First, CATV systems do not serve the public living in the sparsely populated areas that, because of low-population density, are considered uneconomical for cable systems to reach; second, CATV systems do not serve those who, though within the wired-up areas, cannot afford the subscription fee; and third, CATV systems do not provide the benefits of a locally originated television service, available to all without a charge, benefits which are important to the continued welfare of our political, economic, and social systems."

9. In sum, ABC states, the present and prospective trend of CATV growth poses a threat to the kind of local television service now enjoyed by a great many communities throughout the country and fostered by the Commission for many years. It asserts that if CATV "systems of the type now being proposed in many major markets of the country come into being, carrying a dozen or more channels, the ability of stations now serving these markets to provide local service will be substantially impaired and UHF stations scheduled to go on the air in these markets may never get off the ground." Fundamentally at stake, according to ABC, is the question of whether CATV is to be permitted to rework the basic framework of the established broadcasting system from a multiplicity of local stations into a nationwide distribution of signals from major metropolitan centers like New York, Chicago, and Los Angeles. If this were to become the objective of national communications policy, contrary to longstanding Commission and congressional views as to the public interest, more efficient and satisfactory means than CATV distribution could be devised, such as space satellites.³

³ ABC points out that the National Association of Broadcasters expressed a similar concern about the trend of CATV in its comments in docket Nos. 14895 and 15233 as follows:

"If multiple-signal choices were to be the prime objective of communications policy of the United States, as developed by Congress and the Commission, it would have been a rather simple matter to provide for satellites scattered throughout the country, interconnected with New York and Los Angeles. By this means, every community would

10. While taking the position that the Commission's general powers under the Communications Act include authority to prevent persons other than licensees from causing an undue burden on interstate commerce in conflict with the basic purpose of the act and the responsibilities of the Commission,⁴ ABC invokes particularly the specific authority conferred by section 303(h) to "establish areas or zones to be served by any station" (47 U.S.C. 303(h)). It requests the Commission to propose and adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission or in accordance with established regulations defining the basis upon which the signal could be extended beyond the normal service area of the station.⁵ ABC urges that the power to determine the areas or zones to be served by any station necessarily includes the correlative power to make these determinations effective against nonlicensees pursuant to the provisions of sections 4(i), 303(r), 312(b), and 502 of the Communications Act. It notes that these sections do not in terms restrict the Commission's authority to the imposition of limitations on licensees themselves, and that explicit authority to deal with specific practices is not required. *National Broadcasting Company v. United States*, 319 U.S. 190, 218-219; *American Trucking Association v. United States*, 344 U.S. 298, 309-312; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138; *United States v. Pennsylvania R. Co.*, 323 U.S. 612. And, finally, ABC requests the Commission to exercise this authority promptly to prevent imminent frustration of the development and growth of local services through the uncontrolled use of station signals by CATV systems.

11. (b) *The Springfield request for declaratory ruling.*—Springfield, the licensee of UHF station WRLP (channel 32) in Greenfield, Mass.,⁶ requests a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction on the ground that there is an immediate and urgent need for the Commission not only to assert jurisdiction over all CATV systems but also to provide provisional relief from unfair and prejudicial competition to local stations by off-the-air

receive several television signals. But the Congress and the Commission have decided otherwise; that a paramount objective of television broadcasting is to provide each community with at least one local facility.

"If the microwave complex is permitted to relay signals over long distances, an advertiser will soon find that he can secure wide coverage simply by buying a few stations in large metropolitan areas. Nonduplication prohibitions would not remedy this condition. This proliferation of distant signals will result in curtailed buying of local markets by advertisers, which in turn will soon exert economic pressure on countless local outlets with a corresponding depressing influence upon the ability to program locally."

"Accordingly, we submit that the Commission should extend its consideration of microwave applications to include factors beyond simple nonduplication restrictions. It should examine and evaluate the effect the extension of a station's signal far beyond its designated service area would have on overall allocation policies."

"ABC notes that the National Community Television Association has taken the position before the Connecticut Public Utilities Commission that 'a community antenna television system is directly concerned with television broadcasting' and that 'the matter of protection of local television stations' lies in a 'sensitive area of regulation which the Federal Government has wholly preempted.'"

"ABC also requests the Commission to issue a policy statement to the effect that local television broadcasters should be preferred in the issuance of CATV franchises in their communities."

⁶ Springfield is also the licensee of UHF stations in Springfield and Worcester, Mass., and the permittee of a UHF facility in Dayton, Ohio. Previously, on July 28, 1964, Springfield filed a petition for rulemaking (RM-636), to establish technical standards for CATV operations. This petition, and comments already received, will be placed in this docket for further comment.

CATV systems. Using its own situation as an example, Springfield states that the number of CATV systems in competition with WRLP has grown from 9 in 1957 to over 20 at present. These CATV systems bring into the WRLP service area television signals from such distant cities as Albany, Schenectady, Utica, and New York, N.Y.; Poland Spring, Maine; Manchester and Durham, N.H.; Boston, Mass.; and New Haven and Hartford, Conn. Since only one of the CATV systems uses microwave, the rulemaking in dockets Nos. 14895 and 15233 will afford WRLP little relief. Springfield has been unable to reach any satisfactory arrangement with the off-the-air CATV's concerning the carriage and nonduplication of the WRLP signal, and, because of declining revenues, has been forced to discontinue local program origination on WRLP.

12. Springfield predicates Commission jurisdiction on the theory that CATV systems, in receiving and distributing television signals by wire to the public, are engaged in interstate communication by wire within the purview of sections 2(a) and 3(a) of the Communications Act. Section 2(a) states that the provisions of the act "apply to all interstate and foreign communication by wire or radio," and section 3(a) defines "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Springfield asserts that CATV systems are an integral part or connecting link in the dissemination of television signals between the originating facility and the viewing public, and hence are incidental to interstate transmission. For, while the CATV systems themselves are usually located within one community within one State, it is established that the television signals intermediately received, forwarded, and delivered by the CATV are interstate commerce.

13. Like ABC, Springfield finds ample basis for Commission jurisdiction over all CATV systems in sections 4(i), 303, and 307(b) of the Communications Act and the principles laid down in cases such as *National Broadcasting*, *American Trucking*, and *Pennsylvania R. Co.*, in upholding a regulatory agency's use of the broad powers conferred in its enabling statute to protect the integrity of the regulatory scheme.⁷ It requests the Commission to issue a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction and to impose interim operating provisions similar to those adopted in dockets Nos. 14895 and 15233. Springfield claims that prompt action is essential to the success of the all-channel law and expanded use of UHF in small and medium size markets, as the rapid expansion of unregulated off-the-air CATV systems is inhibiting investor interest in UHF television and may permanently stunt the growth of UHF. Asserting further that relief accorded only after lengthy proceedings would come too late, Springfield states that

⁷ Springfield also cites *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177; *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342.

interim provisions are required during the pendency of final rule-making and, being "procedural" in nature, could be imposed summarily.

14. (c) *The Boise petition for interim relief.*—Boise, the licensee of station KBOI-TV in Boise, Idaho, states that it has also filed a petition to deny pending applications for microwave facilities which would relay signals of four stations in Salt Lake City, Utah (approximately 250 miles from Boise), to CATV systems in two communities within KBOI-TV's grade A contour. Conceding that the remedy there requested would be adequate for its own immediate purpose, Boise says that concern over the broader interests of the public has compelled it also to file the instant petition affirmatively supporting ABC's request and presenting additional considerations.

15. Boise states that by allowing CATV to operate uncontrolled, the Commission is, to a considerable extent, abdicating its responsibilities under section 315 (political broadcasts), 317 (sponsorship identification), and 310 (citizen control requirements) of the Communications Act, as well as under its own "fairness doctrine" (controversial issues), enunciated in "Report on Editorializing by Broadcast Licensees," docket No. 8516, 13 FCC 1246, and policies against undue concentration of control of communications media (multiple ownership rules). It urges that these provisions were enacted by Congress or promulgated by the Commission to ensure that the public receives an equal presentation by legally qualified candidates for public office and a fair presentation of controversial issues, is advised of the origin of advertising claims, and is secure in the knowledge that the material it receives has been distributed over facilities controlled and operated by U.S. citizens, with diversification of ownership. The intent of Congress to protect the viewing public in these respects extends to all viewers, and it "is unrealistic to overlook the fact that, through the community systems" the subscribing members of the public "are receiving and are, in a sense, being served by the programs of the originating station." *Clarksburg Publishing Co. v. Federal Communications Commission*, 255 F.2d 511, 517 (C.A.D.C.). CATV operators determine what their subscribers shall view, and being free of all regulation, need not be citizens, can achieve unlimited concentration of control, may censor, advertise without sponsorship identification, and ignore the "fairness doctrine" and equal-time requirements for political broadcasts.

16. Boise accordingly urges that Commission jurisdiction over all CATV is necessary to achieve the purposes of sections 310, 315, and 317 of the Communications Act, as well as to effectuate the Commission's fairness and diversification policies, and can validly be asserted under the doctrine of *American Trucking Association v. United States*, 344 U.S. 298. Alternatively, in the event that the Commission decides against asserting jurisdiction on the basis of its present authority, Boise seeks the imposition of a freeze on all microwave grants for CATV use, or at least those which would extend station signals more than 100 miles from the transmitter, to protect the integrity of the table of assignments pending the enactment of legislation in this field and the finalization of administrative rules. It further suggests that

translator stations and CATV systems should be accorded like treatment by the Commission, i.e., that translators should not be barred from obtaining microwave facilities if they are made available for CATV use and that the rebroadcast permission required for translators under section 325(a) of the Communications Act should similarly apply to CATV operations.

17. (d) *The Westinghouse petition.*—Westinghouse⁸ petitions the Commission to exercise plenary jurisdiction over all CATV systems, institute a new factfinding and rulemaking proceeding directed to all phases of CATV concern, and consolidate the proceedings in dockets Nos. 14895 and 15233, docket No. 15415 (with respect to CATV ownership by broadcast licensees), and RM 672 (the ABC petition).⁹ Specifically, Westinghouse recommends that CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station.

18. Taking the position that CATV in its original role as an extension of service to inadequately served areas is a necessary and desirable adjunct of television broadcasting, Westinghouse states that the principal cause for alarm today is the altered direction of present CATV growth into larger and larger markets—many with three or more existing stations. It points, inter alia, to the six pending applications for CATV franchises in Philadelphia (noting that one of the applicants has announced his intention to spend approximately \$40 million in the development of a Philadelphia system); to the contract signed by Mohawk Valley Community Antenna for installation of a CATV system with 60,000 possible connections; and to the award of a CATV franchise for the suburban Philadelphia community of Upper Darby which is intended to be "the nucleus of CATV systems to serve many additional areas in the Delaware Valley." Westinghouse predicts that within the next 3 months applications for CATV franchises will be filed in every major city of the country, and that the final step in the development of CATV will be a national CATV "network" making all the channels of New York, Los Angeles, and perhaps other major cities available from coast to coast.

19. In the view of Westinghouse, the rapid and unregulated growth of CATV in this direction endangers the Commission's blueprint for television service, as set forth in the sixth report and order, and will frustrate Commission policy with regard to UHF. It has been established, Westinghouse claims, that UHF stations have a much better chance of success in the major metropolitan areas where the oppor-

⁸ Westinghouse bases its interest in this matter on its position as a licensee of television stations in Boston, Baltimore, Pittsburgh, Cleveland, and San Francisco, and on the fact that a CATV microwave common carrier and four CATV systems are owned by its parent corporation, Westinghouse Electric Corp. Westinghouse also asserts an interest on the basis of its status as an independent program producer and distributor.

⁹ A "motion in support of petition for consolidation" of proceedings and in opposition to assertion of jurisdiction over Community Antenna Television Systems," filed by National Community Television Association Inc., on Feb. 10, 1965, apparently also seeks consolidation of docket No. 15586.

tunity for broad advertising support exists. Because of the all-channel receiver legislation, the growth of UHF might be stabilized by the promise of steadily increasing audiences but for investor uncertainty about the trend of CATV. Westinghouse states that if allowed unrestricted growth, CATV will almost certainly impede the development of new stations in markets otherwise capable of supporting them.

20. Westinghouse further states that CATV entry into the larger markets will undoubtedly have an adverse effect upon much of the independent programming now presented by stations in those markets, and on Westinghouse's own activities as an independent program source. In keeping with the Commission's policy of fostering diversity of programming sources, Westinghouse has actively endeavored to develop independent programming, such as the "PM East and PM West" series, the "Mike Douglas" show, "The Steve Allen Show," the "Civil War" series, and "That Regis Philbin Show." If programs such as these, which ordinarily would be sold to many independent stations across the Nation, are carried by CATV into their markets, many of these stations would be unwilling to purchase the programs. Thus, Westinghouse's economic base, upon which such substantial programming efforts necessarily depend, would gradually be destroyed by inability to make sufficient sales. Assuming a 5-year growth of CATV systems in the East on the scale established during the last 2 years, Westinghouse states that the cumulative adverse effect on independent programming sources in the larger markets would indeed be serious.

21. Westinghouse contends that its proposal for barring CATV from areas which now or in the near future will be served by three commercial stations, would further the public interest and effect a reasonable accommodation of the conflicting interests of the television broadcast and CATV industries, in harmony with the Commission's policy on the development of stations. It urges that the millions of Americans throughout the United States living in areas not served by three or more television signals, and therefore unable to receive the major programming services, should not be compelled to wait indefinitely for service. CATV can fill the television needs of such areas today, and should be allowed to do so, since the larger, more densely populated areas offer more promise for new UHF stations in the near future than low-density areas. While CATV would probably have some adverse economic impact on existing stations, this impact is offset in one- and two-station markets by the substantial benefit accruing to the public in the additional program choices provided by CATV.¹⁰ No corresponding benefit can be demonstrated in three or more station markets, where the contribution of CATV is minimal. In such markets, CATV can offer the viewing public little more than a duplication of programming which either has been or soon will be available via the local stations. Moreover, the possible loss to the public is much greater because of the eroding effect CATV would have on the sources of independent programming. Accordingly, Westinghouse believes that barring CATV from such areas while permitting

¹⁰ Westinghouse would make an exception for two-station markets where a construction permit for a third station has been granted, permitting CATV only in the event the third station was not on the air after a reasonable period, like 6 months.

it to serve all areas not adequately receiving the three major programming sources would provide a tremendous benefit in terms of increased service to millions of Americans, while maintaining CATV in its traditional position as a fill-in service complementary to television broadcasting.

22. Westinghouse strongly urges that it is imperative for the Commission to stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect. It states that once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas. Should even a small part of the ambitious \$40,000,000 Philadelphia CATV plan be consummated, the practical and legal difficulties which the Commission would encounter in attempting to reverse the situation would be virtually insurmountable. Moreover, prompt Commission action is asserted to be essential to remove the uncertainty as to the future role of CATV which is discouraging investment in new UHF facilities. Westinghouse states that if the Commission fails to act within the reasonably near future, Westinghouse will be obliged to file "protective" applications for CATV franchises in those cities it now serves through television broadcasting when applications are filed by others, even though disagreeing in principle that these adequately served markets should be open to CATV.

23. (e) *The MST petition for rulemaking.*—The MST petition for comprehensive rulemaking governing all CATV systems renews, with some amplification, the jurisdictional arguments made by the other petitioners. In support of its request for prompt rulemaking action and a stay of microwave grants pending the adoption of rules, MST urges that "CATV's rapidly accelerating movement away from its historic and proper role as an auxiliary, 'fill-in' service bringing television to areas unable to receive off-the-air broadcast service poses a grave threat to the growth of commercial and educational UHF television, to the integrity of the nationwide system of television allocations, and to the continuation, improvement, and expansion of free, competitive, local, and area television broadcasting generally." MST states that regulation of microwave CATV only, and the imposition of carriage and nonduplication requirements alone, would be insufficient to avert the threat. It asserts that the present trend of CATV development, if unchecked and inadequately regulated, would disrupt the growth of UHF television and frustrate the goals of the all-channel receiver legislation; could lead to the destruction of the system of television allocation through fractionalization, blacking out, or impairing local and area broadcasting service; and might prove to be the means of a gradual transition from advertiser-supported free television to pay TV. MST urges that CATV must be confined to its proper role as an auxiliary "fill-in" service, bringing television service into areas which cannot be expected to receive off-the-air broadcast service now or in the near future; for, CATV can appropriately supplement, but must not supplant, television broadcast service.

24. Accordingly, MST requests the Commission to assert jurisdiction over *all* CATV systems without further delay, pursuant to its existing authority, and to proceed expeditiously towards the adoption of rules which would achieve adequate regulation, since the "longer action is delayed, the more serious the impact of CATV, the more uncertain the rules of the game, and the less effective the action." Pending the adoption of rules, MST seeks a stay on microwave grants for CATV use. It states: "Such a stay is warranted here because of the scope of the problem, because conditions are changing at a rapid pace, and because there are now *no* Commission rules dealing in any way with CATV except as to limited technical matters. Additionally, the Commission should put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations."

25. Specifically, MST requests the Commission to initiate rulemaking of general applicability which would—

(1) Provide appropriate standards to govern the technical quality of signals distributed by CATV;

(2) Prevent CATV from duplicating within a specified period, the programming of television broadcast stations which serve, or which normally would be expected to serve, the community in question, and establish proper classifications to determine the circumstances under which CATV will not duplicate the programming of a station;

(3) Subject to nonduplication requirements, require the CATV system to carry the signal of any station within the grade B or better contour of which the community served by the CATV is located;

(4) Permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station, or is consistent with a standard combining both distance and signal contours;¹¹

(5) Limit, with respect to television and visual material generally, CATV systems to reception and simultaneous retransmission of broadcast signals, without insertions or deletions;

(6) Require the filing of full information with respect to ownership interests in, direct and indirect control of, and officerships and directorships in CATV facilities.

DISCUSSION

26. The above-described petitions raise substantial questions of fundamental importance to the Commission's responsibilities under the Communications Act. We discuss in part I below the requests for Commission action to extend the requirements of dockets Nos. 14895 and 15233 to all CATV systems, and in part II the additional questions presented by petitioners' requests for other measures.

PART I

27. Insofar as petitioners urge that the rules governing CATV systems using microwave should extend to all CATV systems, we are in agreement. It has already been determined in the report and order in dockets Nos. 14895 and 15233 that CATV systems should carry local

¹¹ In a policy statement submitted to the Commission, MST suggested the grade B contour of the station carried, or a distance of 80-90 miles.

stations without duplication. The considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service, apply equally to all CATV systems and need no elaboration here. The main questions are therefore (1) whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether there are any special problems of substance or procedures inherent in an extension of the carriage and nonduplication requirements to nonmicrowave, or so-called off-the-air CATV systems.

28. The Commission's jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion. We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting.¹² Moreover, we have previously taken the position that clarifying legislation would be appropriate, even assuming present jurisdiction, and have recommended such legislation to Congress. While the 86th Congress gave extensive consideration to some of the various proposals submitted by the Commission and others, no legislation was enacted and bills introduced in subsequent Congresses received no action.¹³ However, neither the Commission's prior pronouncements nor the failure of Congress to act favorably on clarifying proposals is determinative of the legal question of the Commission's jurisdiction and authority over off-the-air CATV systems under the existing provisions of the Communications Act. *Helvering v. Clifford*, 309 U.S. 311, 337-338; *United States v. Price*, 361 U.S. 304, 310-313; *American Trucking Assoc. v. United States*, 344 U.S. 298, 314; *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F.2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).

29. Petitioners have made a strong case in support of present jurisdiction. We have carefully reexamined the pertinent provisions of the Communications Act in light of their arguments and the authorities cited. Upon such reconsideration, we conclude, for the reasons set forth in the attached memorandum as to jurisdiction, that CATV systems are engaged in interstate communication by wire to which the

¹² See *Frontier Broadcasting Co. v. Collier*, 16 Pike & Fischer, R.R. 1005; *Report and Order in Docket No. 12443*, 28 F.C.C. 403; *Distribution of Television Programs by CATV Systems*, FCC 62-871.

¹³ Following the report and order in docket No. 12443, supra, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801, and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741, and S. 1886. On Sept. 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86 Cong., 1st Sess. In 1960, following 2 days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407, and 10520), S. 2653 was committed to the Committee on Interstate and Foreign Commerce by one vote, 106 Cong. Rec. 10547. As a result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044, and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It would further appear that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave.¹⁴

30. For the reasons set forth in the report and order in dockets Nos. 14895 and 15233, it is desirable to extend the requirements there adopted to all CATV systems. We have accordingly decided to institute rulemaking to that effect. Although no specific rules are appended, it is proposed to make the substantive provisions of the rules adopted in dockets Nos. 14895 and 15233 applicable to all CATV systems. We repeat that two particular issues are raised—(i) the Commission's authority to promulgate such rules and (ii) the problems of substance or procedure posed by rules going to nonmicrowave CATV systems. In the latter respect we also point out that we shall take into account the experience gained, or additional information received, as a result of interim operation under the revised provisions adopted in dockets Nos. 14895 and 15233, prior to their becoming generally applicable. In this way, we shall be in a position (assuming favorable resolution of the jurisdictional issue) to promulgate rules affecting all CATV systems and fully and fairly implementing the public interest both with respect to establishment and maintenance of local broadcast service and the provision of multiple television services. See paragraph 6, FCC 65-335, issued this day.¹⁵

31. Other matters should be pointed up. While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford the interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from

¹⁴ In initially reaching this conclusion, we have considered the various comments submitted in opposition to the ABC and other petitions.

¹⁵ Since there has been extensive examination of the matters in dockets Nos. 14895 and 15233, a shorter time for filing comments and reply comments on part I will therefore be scheduled. We are unable to agree with Springfield's contention that immediate relief is procedural in nature or to conclude that summary procedures would be proper.

promulgating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

32. Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no Federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and State regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.

33. Fourth, in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (report and order in dockets Nos. 14895 and 15233, par. 143). However, we were unable to determine without further information whether this exception should apply across the board or whether the CATV system should be required to make a showing that a certain number or percentage of its subscribers possess color receiving sets before color duplication would be permitted. Accordingly, comments are requested as to whether the rules should require a threshold showing by the CATV and, if so, what kind of showing would be appropriate. Whether or not the Commission adopts rules going to all CATV systems, the comments received will, in any event, be applicable to microwave CATV systems.

34. We will consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave CATV systems with limited channel capacity. It is contemplated that a questionnaire will be mailed to every known CATV operator in the near future seeking specific information to assist in making this determination (see FCC 65-335, par. 161). In the event that any CATV operator is inadvertently omitted from such distribution, a copy of the questionnaire will be supplied upon request to the Commission.

35. The proceedings in dockets Nos. 14895 and 15233 were primarily concerned with commercial rather than educational television stations (ETV). While the carriage requirements were made applicable to

educational stations, the nonduplication provisions were not, since many of the pertinent considerations are obviously not present in the case of ETV. We recognize, however, that the carriage requirements alone may not be sufficient to promote the sound growth of local educational stations. Accordingly, information is requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

36. We are also interested in such questions as whether the carriage and nonduplication requirements should be extended to protect station-owned translators, which are located outside the station's predicted grade B contour, so as to encourage these off-the-air facilities. If protection were to be accorded such translator facilities, should the rules be along the lines of those adopted for local stations, or would different provisions be more appropriate? Conversely, some of the comments in dockets Nos. 14895 and 15233 suggested that station-owned translators should be precluded from duplicating the programs of local stations. Interested persons are invited to address themselves in this proceeding to the question of whether there is a problem warranting action.¹⁶

PART II

37. The petitions also raise broader questions of substance concerning CATV development, both microwave and nonmicrowave, which were not involved or settled in dockets Nos. 14895 and 15233. Thus, it is asserted (1) that the trend of CATV entry into large population centers like Philadelphia and Cleveland poses a threat to the development of independent stations and program sources, which will not be averted by the carriage and nonduplication requirements and which may frustrate the goal of the all-channel receiver legislation in the communities with the most immediate promise for new UHF facilities. It is also asserted (2) that generalized restrictions on the distance the signal of a television station may be extended beyond the station's contour are necessary in order to prevent the multiplicity of local stations contemplated by the sixth report and order from being ultimately displaced by a CATV "network" distributing the New York, Chicago, and Los Angeles stations nationwide. And it is asserted (3) that CATV systems should be required to select the stations they carry in an order of priority determined by the distance of each station from the system, i.e., that the system should carry nearer stations in preference to more distant ones, so as to avoid "leap-frogging." Next, the petitions raise a question (4) as to whether CATV systems should be limited to receiving and simultaneously retransmitting television broadcast signals without addition or deletion, or should be subject to sections 315, 317, and 310 of the act and various Commission policies (e.g., the "fairness doctrine" and concentration of control policies). A related question is presented as to the possible development of combined CATV-pay TV operations and the need for regulation to avoid adverse consequences to the free television broad-

¹⁶ In this connection, comments are requested on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators.

cast service. And (5), it appears to the Commission that there are other areas of concern.

38. For the reasons next set forth, we believe that inquiry to ascertain the facts in each of these areas is warranted in the public interest. The inquiry will develop information upon which we can determine whether rules or legislative proposals to the Congress are appropriate.

(1) *Effect on Development of Independent (Nonnetwork) UHF Stations*

39. Of concern to the Commission is the mushrooming entry of CATV into major centers of population insofar as this affects the opportunities for new UHF stations. The developing pattern of CATV described by petitioners is confirmed by the CATV industry itself as an augury of coming events. The largest CATV group, H. & B. American Corp., recently advised its stockholders that CATV activity in larger cities is of first importance among significant CATV developments, stating:

First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.

But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. Baltimore will be the next large U.S. city to receive multiple CATV franchise applications.

The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day. It is reported that at the end of 1964, 700 cities throughout the Nation were entertaining CATV proposals.

In virtually every instance these authorizations are fought for in intensively competitive proceedings before local governing bodies. The applicants represent a cross section of the most prominent companies in the Nation. For example, in Philadelphia they include the Philadelphia Bulletin, Storer Broadcasting, the Philadelphia Inquirer-Triangle-Annenberg interests, a number of well financed influential local groups, and a sprinkling of large CATV organizations.

40. The shift in the locus of CATV activities to the larger cities is cause for concern as to the effect on UHF and the stated goal of Congress in enacting the all-channel receiver legislation to make "provision for at least four commercial stations in all large centers of population" (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3). The following are the underlying congressional and Commission policy considerations as to development of the UHF:

41. (i) Congress has only recently reaffirmed the goal of "an effective national television" system through use of the UHF channels (*id.*, p. 6; see also p. 3). As the first item in such an effective television system, Congress listed the need "for at least four commercial stations in all large centers of population" (*id.* at p. 3). Such a

fourth station might make possible a fourth national network or the formation of FM-type "networks" in television, thus bringing added diversity to the field. Or, as both House and Senate reports stress, such a station might be "available particularly for local programming and self-expression * * *"—an important need in many markets "because all of the available stations are network affiliates" (H. Rept., p. 3; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 4). In short, the fourth commercial station is important both to make our system "truly competitive on a national scale" (H. Rept., p. 3) and to further better local service.

42. (ii) Congress has also determined that the way to achieve the above goal is through effective use of UHF channels, since most large centers of population now have three full network stations and no unoccupied VHF frequencies. While Congress was generally aware of CATV (e.g., the same Senate committee which considered the all-channel television receiver law in 1962 had held extensive hearings on CATV in 1959), it stated its view that all-channel receiver legislation, because it would develop UHF, "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. at p. 4; S. Rept. at p. 7). It therefore enacted this "unique" all-channel set legislation, stating the increased price which the consumer will have to pay, at least initially, for all-channel sets "will be well worth the cost if this is the only way in which the American people can be assured of the benefits of television service to the fullest degree" (H. Rept. at pp. 8-9). Since the sale of television sets now exceeds 9,000,000 a year, the American people are now paying those costs, in the substantial amount of many millions each year.

43. (iii) There is every present indication that the all-channel set requirement is having its desired effect, and that the legislative goal is in the process of being realized. There has been greatly increased interest in UHF, with many applications filed—preponderantly for the larger cities. See attached chart (app. A) showing the markets with no commercial UHF station on the air but with commercial UHF construction permits granted and/or commercial UHF channels applied for. But as Congress noted in 1962, the all-channel law will not smooth the road for the UHF broadcaster overnight; rather, "Substantial time will have to elapse * * * before a large majority of the public becomes equipped with all-channel receivers" (H. Rept., at p. 7; S. Rept., at p. 6).

44. (iv) The Commission also has noted that UHF stations face considerable obstacles during this crucial period. UHF must overcome the psychological factor of its previous failure in intermixed markets. Further, apart from intermixture and the initial limitation on audience pending set conversion or turnover, independent UHF stations in these cities will compete with three network affiliates for audience attention without having the advantage of the attraction of the popular network programming. The Commission therefore has stressed that it will not now take action which would be inconsistent with the congressional goal and which might jeopardize the "invest-

ment in all-channel receivers" (H. Rept. at p. 8) which has been asked of the American public.

45. The question before the Commission is what is the effect of CATV entry into the large markets upon the realization of the above goals for UHF. The problem is perhaps best pointed up by consideration of a specific case—Philadelphia. That city is a prime example of a potential UHF activity, with two UHF independent stations scheduled to go on the air in mid-1965. But Philadelphia is also a prime example of CATV activities, with the CATV applicants in Philadelphia proposing to carry the New York independents. The Philadelphia UHF stations, in competing with three network VHF stations, will be relying solely upon reaching an audience interested in independent (nonnetwork) programming. Since the local competition is not only VHF but enjoys the advantage of popular network programming, unexpected fractionalization of the audience interested in independent programming could be particularly harmful to these independent stations.¹⁷ And, the CATV will be doing just that—bringing in three New York stations which also direct their efforts to the audience interested in independent programming. The crucial question is thus whether the result will be that New York independents will, in effect, be replacing Philadelphia UHF independents, with a concomitant loss of local service or the other advantages noted in paragraph 41.

46. The Commission needs further information with respect to that question before reaching a conclusion. On the one hand, it is urged that CATV systems in Philadelphia or similar large cities will remain relatively small and do not pose any significant threat to the legislative goal noted in paragraph 41. See, e.g., Seiden report, pages 84-86. Indeed, it is urged that the CATV system will benefit the new UHF operation by bringing the UHF station's signal into homes which do not yet have all-channel receiver sets or where UHF reception might otherwise be difficult.¹⁸ There are, however, indications running counter to the claim that CATV operations will have relatively little impact. Consider, for example, the extensive nature of the CATV operations proposed in some of the large cities (in Philadelphia, we are told that a \$40 million CATV investment is contemplated). And, generally, the spirited competition for CATV franchises in major cities by well-financed groups would appear to reflect the confidence of the CATV applicants in their success.¹⁹

¹⁷ Moreover, the nonduplication time period prescribed in dockets Nos. 14895 and 15233 is geared largely to the schedule of network program distribution, on the premise that network affiliates will have a reasonable opportunity for viable operation if their popular network programming is not subject to CATV duplication. The prohibition against duplication 15 days before or after the local broadcast will provide only partial relief, at best, to independent stations, which rely on nonnetwork programming that is not presented simultaneously, or nearly so, nationwide.

¹⁸ We note, however, in connection with the Philadelphia example which we have been pursuing above, that the franchise application of Jerold Corp. in Philadelphia does not propose to carry the Philadelphia UHF stations on the CATV system, until such time as it might convert from a 12-channel to a 20-channel system.

¹⁹ We also note, in this regard, that the Seiden report (pp. 85-86) does not consider the likelihood that the Philadelphia audience which would be attracted to the programming of the New York independent stations is the very heart of the audience at which any independent Philadelphia UHF station must aim. Instead, it is assumed that the potential Philadelphia audience for New York independent stations is like any other part of the Philadelphia audience, from the standpoint of Philadelphia independent stations. This assumption, we think, raises a question as to the correctness of the conclusion reached in the report.

47. It may be, after development and study of the facts and consideration of the arguments of interested persons, that the problem will appear less serious or take on new aspects. Or, it may be that CATV systems should not enter markets like Philadelphia for a period of 4 or 5 years—roughly the length of time remaining, which Congress specified as necessary in order to permit the substantial effects of the all-channel set law to be felt (i.e., to permit UHF independent stations to gain a proper foothold). We need further information before reaching a decision and, for that reason are initiating this inquiry. For, we do know that we would be wholly remiss in our responsibilities if we ignored the problem—and simply permitted events to occur (indeed, often with the aid of our authorizations in the microwave services) which might jeopardize the congressional goals just set, and the “investment in all-channel receivers” which the public is now making. If such goals are to be changed, that is a matter for Congress (with our task to collect the facts and make appropriate recommendations).

48. Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.

49. While the proceeding is underway, we shall carefully examine applications coming before us which involve the above problem. This means that pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

50. The foregoing takes up the Commission's concern and course of action as to microwave applications coming before it during the

interim period while the proceeding is underway.²⁰ The same concern is applicable, whether or not the CATV proposes to employ microwave facilities, to situations where there is proposed large-scale CATV operations in major cities with burgeoning UHF independent development. Indeed, we note that the large-scale CATV operations proposed for Philadelphia do not make use of microwave facilities. We therefore request comments on what interim course of action, if any, may be appropriately followed by the Commission in this respect.²¹ Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to part I of the notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community). This is also one of the matters which we shall bring to the attention of the Congress. Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration.

(2) *Generalized Restrictions on CATV Extension of Station Signals*

51. Both the ABC and the AMST petitions urge that more general action is necessary to prevent fractionalization of audience and potential damage to the nationwide system of television broadcasting through a multiplicity of local stations contemplated by our allocations scheme. Accordingly, they propose general limitations upon a CATV's ability to extend the service area of any station—either in terms of distance from the station or of a specified signal contour or some combination of the two.²² The issue is particularly raised whether the extension—perhaps for hundred of miles—of the service of a powerful station operating in a very large market (and thus able to devote more resources to obtaining programming) may have an especially adverse impact upon the development or maintenance of the local stations contemplated by the allocations scheme.

²⁰ We have also taken into account, in our decision to adopt this interim policy, the fact that the areas to which the policy will be applicable do have a significant amount of television service, with additional new UHF service in the offing.

²¹ Such comments may discuss the jurisdictional as well as the policy considerations in any particular course of action.

²² We note in this connection that plans are on the drawing board for a CATV system capacity of 20 channels. Interested persons may wish to address themselves to the question of what effect CATV operations of this or a similar nature might have on local stations in terms of fractionalization of audience, and whether some limitation as to the number of signals carried should be considered.

52. We have reached no conclusion that broad-scale restrictions along these lines are warranted.²³ Rather, as a part of our general inquiry, we invite comments directed to the proposals.

(3) "Leapfrogging"

53. Petitioners' assertions concerning the so-called leapfrogging issue (i.e., the distribution by the CATV system of distant signals in preference to signals of stations located much closer to the system) also raise a matter of future importance. Again we have reached no conclusion on this issue and would simply have the interested parties address themselves to it, both as to the facts and to pertinent policy considerations (and also the proposals which have been advanced by parties such as AMST in this respect). Thus, does it promote "the larger and more effective use of radio in the public interest" (sec. 303 (g)), if the closer signals are carried (on the ground that carriage of such signals would bring a programming service more likely to come closer to meeting the CATV community's interests than those from a distant state)? Is such carriage called for in the public interest in order to extend the service area of UHF stations or VHF stations serving sparsely populated areas—and thus enhance, to some extent, their chances of successful operation and their ability to serve fully the needs and interests of these areas?²⁴ If a policy along the foregoing lines were to be adopted, should it be accompanied by a concomitant duty, on the part of the station carried, to provide some amount of programming of particular interest to the people in the CATV's community? Cf. *Petersburg Television Corp.*, 10 Pike and Fischer, R.R. 567, 584j—584q; *NTA*, 22 Pike and Fischer, R.R. 273, 295. What kinds of disruption or other problems would such a requirement pose for CATV systems? If "leapfrogging" rules were adopted, is there a probability that the CATV, in order to meet the rules and still bring in desired distant signals, may distribute so many signals that the fractionalization of the audience aspect becomes much more serious (in the event there are local stations being carried pursuant to the requirements of the rules adopted in dockets Nos. 14895 and 15233)? These questions by no means exhaust the list of pertinent considerations to which we hope the interested parties will address themselves.²⁵

(4) *Program Origination or Alteration by CATV; Pay-TV or Combined CATV-Pay-TV Operations*

54. A fourth area of concern is the question of program origination or alteration by CATV. There was some indication in dockets Nos.

²³ Certainly, we have not concluded that there should be restrictions which might prevent areas now without the benefit of the basic services of the three national networks from ever obtaining those benefits. But here we note that AMST would appear to urge exceptions to the general restrictions it proposes where a CATV makes a showing of public need for its service.

²⁴ In this connection, we note our discussion in the report and order in dockets Nos. 14895 and 15233, par. 69, as to increased awareness by rating services and advertisers of CATV penetration and CATV extension of a station's service.

²⁵ We do not believe it necessary or appropriate, pending resolution of this issue, to hold up all applications for microwave facilities to relay television signals to CATV systems. Rather, parties may bring public interest considerations pertinent to this issue to our attention in connection with specific applications, and we ourselves shall examine such applications with this issue in mind.

14895 and 15233 that CATV systems may be originating advertising material in some instances and deleting advertising from the station signals carried. We believe that inquiry is appropriate to determine whether CATV systems should be subject to the provisions of sections 315 and 317 of the Communications Act and to a requirement that there be no deletion of the station identification announcement of any signals carried.

55. A related question is presented by the assertion of some of the petitioners that CATV might become a vehicle of pay-TV or combined CATV-pay-TV operations. They express a fear that the end result of such operations might be to siphon off top attractions from free television, if the fees obtained from large-scale CATV operations should enable CATV operators to outbid television broadcast stations in the program supply market, or that it might prove to be the means of a gradual transition from advertiser-supported free television to pay-TV generally. It is further urged that CATV systems should not be permitted to use the distribution of free television signals as a base for engaging in pay-TV operations. We have been advised of at least one instance where a CATV system has devoted a channel on the cable exclusively to the presentation of its own programming (both CATV originated local programs and films acquired from others).

56. The possible impact of subscription television on free television broadcast service has been a continuing subject of Commission and congressional concern. See *Third Report on Subscription Television*, 26 F.C.C. 265; *Connecticut Committee Against Pay TV v. Federal Communications Commission*, 301 F. 2d 835 (C.A.D.C.), cert. den. 371 U.S. 816. In light of that concern, comments are requested on the feasibility or desirability of pay-TV operations by CATV, whether any conditions would be required for the protection of the public interest in free television, and what conditions might be appropriate.²⁶

57. In short, comments are requested as to whether CATV systems should be limited to simultaneous distribution of station signals without additions or deletions, or whether there should be no limitation on program origination by the CATV, or whether some intermediate position would be appropriate. The Commission has reached no conclusions in this area, and requests comments on all facets of the question. For example, in addition to the two basic issues posed above (i.e., complete restriction or complete freedom as to program origination), there are intermediate issues where comment might be helpful. Thus, comments are invited on the question of whether any such prohibition against CATV program and advertising origination should apply only where the CATV is operating in an area served by one or more television broadcast stations. In the absence of any local station, would the public interest be served if the CATV were not only permitted, but even encouraged, to serve the community by providing an outlet for local self-expression? Where there is but one local station, should the CATV be barred from carrying advertis-

²⁶ This proceeding is in no way intended to be concerned with, or to affect, the question of whether there is a property right in the broadcast signals carried by CATV systems (see FCC 65 —, par. 159).

ing but permitted and encouraged to present local programming, particularly in the news and public affairs field (on the ground that such local programming provides a needed diversity in a monopoly situation, and poses no threat to the viability of the local station)?

58. Some of the foregoing matters may be appropriate for Commission rulemaking (e.g., the sec. 315, sec. 317, or station identification requirements), while others may call for congressional consideration and resolution. Again, we think that as a matter of "first things first," we should garner the facts and pertinent considerations.

(5) Other Areas of Concern

59. In view of the interest engendered concerning ownership and control of CATV systems, comments are requested on the proposals of petitioners with respect to the regular filing of information as to CATV ownership, control, and management (see particularly the Boise and AMST petitions). Would it be appropriate to require the periodic filing of other information, such as the location of the CATV system, the number of subscribers, the signals carried, and the extent of program origination, if any? While much useful information was gathered in connection with dockets Nos. 14895 and 15233, the statistics will soon be out of date in a rapidly changing CATV field. Moreover, the questionnaire discussed in paragraph 34 above is occasioned by a lack of specific information with respect to each CATV system. It appears to us that it might be more efficient and serve the convenience of interested persons, as well as the Commission, if pertinent information were regularly supplied by each CATV operator on a current basis.

60. The general matter of cross-ownership of CATV systems and broadcast facilities is being pursued separately in docket No. 15415. Interested persons are nevertheless invited to address themselves in this proceeding to those aspects of the cross-ownership question which may be pertinent to the overall policy questions raised here. For example, there is the question of whether grants for translator facilities or local stations should be made to CATV systems in communities which have no off-the-air television service where there is no imminent likelihood of an independent applicant. In other words, would the public interest be served by permitting, or even encouraging, CATV systems to provide an off-the-air service to areas which would otherwise have none? Should a similar policy be followed to provide a second off-the-air service, or would cross-ownership afford the CATV licensee and unfair competitive advantage over the independent licensee? (see FCC 65-335, pars. 91, 134).

61. Another area of great interest to the Commission is the proposal in Dr. Seiden's report that rulemaking action should be taken to afford potential and existing stations a sufficiently large service area to withstand CATV penetration. This proposal is set out in detail at pages 7, 89-90 of the report and will not, therefore, be repeated here. Comments are requested as to the feasibility and merits of the proposal and the most appropriate way of implementing it.

More generally, we are of the opinion that all of our rules and policies should be reexamined to see if they are holding back or encouraging a variety of off-the-air services. In this connection, there is pending a proposal to facilitate the use of translators on allocated channels (FCC 65-129, docket No. 15858).

62. Some of the petitioners have urged the Commission to establish appropriate technical standards to govern the operation of CATV systems, e.g., with respect to the technical quality of signals distributed by CATV. It appears to us that the matter of technical standards warrants inquiry. As a starting point, comments are requested on the proposals of petitioners (see RM-636 filed by Springfield, p. 6, fn. 6 above, and the proposal of AMST, p. 12, par. 25(1) above).

63. The foregoing discussion has been directed toward CATV operations vis-a-vis television broadcast facilities. It has been brought to our attention that a standard broadcast or FM radio station might face serious audience fractionalization if a CATV system were to bring a number of competing aural signals to its subscribers. Accordingly, comments are requested as to whether any serious problem exists, or is likely to exist, in this area and, if so, the nature of any regulatory measures which might be appropriate to govern the distribution of aural signals by CATV.

64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counterproposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission.

65. The inquiry and proposed rulemaking are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. Consideration of nonmicro-

wave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time.

66. Accordingly, there is instituted herewith, pursuant to the provisions of section 403 of the Communications Act, an inquiry into the foregoing matters. Authority for the rulemaking proceeding instituted herein is contained in sections 2, 3, 4(i), 303, 307, 308, 309, 310, 315, and 317 of the Communications Act of 1934, as amended.

67. All interested persons are invited to file written comments on the rule amendments proposed in part I, and on paragraph 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rulemaking in part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice.

68. After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited, and appropriate orders specifying the nature and time may be issued at a later date. After comments have been received, the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration.

69. In accordance with the provisions of section 1.419 of the Commission's rules and regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished the Commission.

70. In light of the foregoing, *It is ordered*, That the various requests made in the pleadings filed by American Broadcasting Co., Springfield Television Broadcasting Corp., Boise Valley Broadcasters, Inc., Westinghouse Broadcasting Co., Inc., Association of Maximum Service Telecasters, Inc., Capital Cities Broadcasting Corp., Taft Broadcasting Co., and National Community Television Association, Inc., *Are granted in part*, to the extent reflected in this notice, and *Are otherwise denied*.

APPENDIX A

MARKETS WITH NO COMMERCIAL UHF STATION ON AIR BUT WITH COMMERCIAL UHF CONSTRUCTION PERMITS GRANTED AND/OR COMMERCIAL UHF CHANNELS APPLIED FOR

	Commercial VHF stations on air	Commercial UHF construction permits	Commercial UHF channels applied for	Vacant commercial UHF channels
Atlanta, Ga.	3	1		
Austin, Tex.	1	12		
Austin-Rochester, Minn.-Mason City, Iowa.	3		1	2
Baltimore, Md.	3	1	1	
Birmingham, Ala.	2	1		
Charlotte, N.C.	2	11		
Charleston-Huntington, W. Va.	3	1		
Cincinnati, Ohio	3	1		
Cleveland, Ohio	3		2	
Columbus, Ohio	3		1	
Dallas-Fort Worth, Tex.	4		2	1
Detroit, Mich.	3	12	1	
Eugene, Oreg.	2			1
Houston-Galveston, Tex.	3	1	3	2
Indianapolis-Bloomington, Ind.	4		1	2
Jacksonville, Fla.	2	1		
Joplin, Mo.-Pittsburg, Kans.	2		1	2
Kansas City, Mo.	2		2	
Lubbock, Tex.	2		2	
Meridian, Miss.	1	1		
Miami-Fort Lauderdale, Fla.	3	12	1	
Midland, Tex.	1	1		
Minneapolis-St. Paul, Minn.	4		1	
New Orleans, La.	3	1	1	2
Norfolk-Portsmouth-Newport News, Va.	3			
Oklahoma City, Okla.	3	1		
Philadelphia, Pa.	3	3		
Pittsburgh, Pa.	3	2		
Providence, R.I.	2	1		
St. Louis, Mo.	4	1		1
San Diego, Calif.	2	1	1	
San Francisco-Oakland, Calif.	4	3	1	1
San Jose-Salinas-Monterey, Calif.	2	1		
Toledo, Ohio	2	1		1
Tulsa, Okla.	3	1		1
Ponce, P.R.	2	1	1	
Total	96	34	25	17

¹ A permittee has gone on the air since Jan. 1, 1965.

² There is also a C.P. for a commercial VHF station.

APPENDIX B

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by

wire or radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).¹ Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).² The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. *California Interstate Telephone Company v. F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, *Clarksburg Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the act are applicable (sec. 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311.³

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order).⁴ See *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to:

- perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
- make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * (303(f));
- establish areas or zones to be served by any station (303(h)); make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act * * * (303(r)).⁵

¹ It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

² Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Cong. Rec. at 6256.

³ It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

⁴ In addition, as noted in the notice, there exists the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

⁵ Sec. 303 (f), (h), and (r) are preceded by the following clause:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—"

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (e.g., secs. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).⁶ The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 215-220, the Supreme Court citing, inter alia, sections 1, 303(f), and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * *. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,⁷ the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to ensure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203. See also, *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219, where the Supreme Court stated:

True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards

⁶ Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st Sess., pp. 40-41.

⁷ See also, *Stahman v. F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Cong. Rec. 8822-23, 10313-14, 10990): 66 Cong. Rec. 5479; S. Rep. 772, 69th Cong., 1st Sess., pp. 2-3.

for judgment adequately related in their application to the problems to be solved.*

To the same effect in other fields, see *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342; *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110; *U.S. v. Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc. v. U.S.*, 344 U.S. 298; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F.2d 893, 897 (C.A.D.C.).*

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a) (19).

We point out that section 204(a) (6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a) (19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309-310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-220: * * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created. * * *

See, also, *Public Service Comm. of N.Y. v. FPC*, 327 F.2d 893, 896-97 (C.A.D.C.). Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F.2d 943, 952 (C.A. 10). See also, *American Trucking Assn. v. U.S.*, 344 U.S., at 314-315; *National Broadcasting Co. v.*

* The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217-218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

* The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of the Communications Act. The Court stated (327 F.2d at 897): "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

U.S., 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").¹⁰ The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity of rules requiring all CATV's to carry local stations without duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition" but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363-364). The notice of inquiry and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programming sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART
AND DISSENTING IN PART

I concur in the notices to the extent that they seek data for resolution of the matters here before us, but dissent to the indication of present authority over CATV.

OPINION OF COMMISSIONER LOEVINGER CONCURRING IN PART AND DISSENT-
ING IN PART IN DOCKETS NOS. 14895, 15233, AND 15971

(Proceedings re CATV's)

* * * * *

The Commission is issuing today a report and order, a notice of inquiry and of proposed rulemaking, a memorandum on jurisdiction and the text of new rules all of which relate to the problems posed by community antenna television systems, commonly referred to as CATV's. These documents aggregate over 120 pages and set forth such a mass of detail that the outlines of the problem, as well as the basic issues, are somewhat obscured, if not wholly submerged. Accordingly, it seems worthwhile to restate very briefly and simply what the problems and the issues are, in order to indicate my points of agreement and disagreement with the majority.

A CATV is a system comprising an antenna for receiving television signals, and cables and auxiliary apparatus (such as amplifiers) for carrying the signals received into a number of receiving sets. CATV's are about as old as commercial television itself, the first systems having been started as early as 1950. CATV's have been developed in order to fill the wants of those who either because of distance or terrain were

¹⁰The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark v. Wickard*, 321 U.S. 288; *NLRB v. Atlantic Metallic Casket Co.*, 205 F. 2d 931 (C.A. 5). Cf. *Peters v. Hobby*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.

unable to get television signals off the air in satisfactory quality or numbers. (See articles in *Television Magazine*, June 1962, September 1964, and April 1965.)

For a variety of reasons, some of them related to actions of the FCC, the commercial CATV business has developed through independent companies which transmit or relay the signals and other companies which distribute the signals to subscribers. Typically there will be an antenna on some high point near a community which receives the signals of a number of TV stations. These signals will be transmitted either by microwave relay or by coaxial cable to a point in the settled part of the community. At this point the relay company will deliver the signals to the CATV operating company. The latter will maintain and operate the system which distributes the signals over wires to the homes of subscribers within the community. In some cases the relay company will deliver signals to several CATV companies.

CATV's were started in mountainous areas of Pennsylvania and Oregon where television reception was either poor or nonexistent for many communities. As it appeared that CATV's were able to bring good reception and offer a variety of services to communities far outside the major metropolitan centers, the companies spread to more communities and got more subscribers. Over the years, as television has grown in both numbers of broadcasting stations and numbers of homes, CATV has also grown, although by no means in proportion. In rough figures there are now about 566 television stations in the United States covering some 266 markets. (*Television Magazine*, April 1965, p. 85.) Over 52 million U.S. households have television receivers, which is 92 percent of all of the U.S. households. (*Ibid.*) The CATV industry today has about 1,300 operating systems serving about 1.2 million homes. (Seiden report to the FCC, p. 1.) CATV's are concentrated largely in one- or two-station markets. Most systems are fairly small in size, about 90 percent having fewer than 3,000 subscribers, and the average having about 655 subscribers. Most CATV's deliver five signals to their subscribers, although some deliver as few as three and some as many as seven or more. (*Ibid.*) However, the number and size of CATV's is growing and CATV systems are being offered to more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the television business as an economic threat. It is said that while the broadcaster has the burden and expense of providing programing which the audience gets without payment and which must be supported by advertising, the CATV operator simply delivers the broadcasters' programing to subscribers and receives payment from them. This is said to constitute unfair competition. It is also alleged that the competition is not only unfair but destructive in some situations, because CATV's deliver the signals of far-distant stations and deliver a relatively large number of signals to relatively small communities in which the audience is not large enough to support a number of stations. CATV's create the anomaly that some relatively small towns are provided with a greater choice of television programing over the local CATV than many larger cities have in the absence of CATV.

These circumstances have created a demand by many broadcasters for the FCC to take jurisdiction over CATV's and to institute measures to protect television broadcasters against competition of CATV's. As will be pointed out in some detail below, the FCC has instituted several proceedings and investigations relating to this matter. However, heretofore it has not taken any definitive action of general significance. While there has been some question as to the extent of the FCC jurisdiction, the Commission has had undisputed jurisdiction with respect to licensing microwave transmitting facilities for those relay companies that carry TV signals by microwave. The manner of exercising that jurisdiction is one of the matters that has been bitterly disputed and that is involved in the present proceedings.

By the documents which the Commission is now promulgating it adopts a series of measures which represent the conclusion of the Commission majority as to the action that the Commission should take in this field. There are four significant measures involved.

First, the Commission rules that CATV's must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV's by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

Second, the Commission rules that the relay companies must require the CATV's which they serve to avoid the delivery to their customers of the television signals of any program which duplicates the program of any local station. This rule of nonduplication does not refer merely to simultaneous duplication, but requires CATV's to avoid presenting any duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATV's served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intrastate and that transmit signals entirely by wire. Although this conclusion is called "tentative," the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking further comment on more than a dozen and a half questions, all of them relating to the possibility of imposing further restrictions upon the operations of CATV's.

It seems to me that in its approach to the CATV problem the Commission is doing the wrong thing for the wrong reason in the wrong manner to deal with the wrong problem. It is thereby erecting only a gossamer barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to control, directly or indirectly, the specific programs which shall be presented to the audience. The Commission is acting for the wrong reason because it seeks only to limit competition. The Commission is proceeding in the wrong manner because it is acting to extend its juris-

diction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, and will impose nonduplication rules, and disregarding the risk that the action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATV's, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the nonduplication rule which I believe is an improper attempt to limit competition by controlling programing; and I disagree with the Commission's attempt to extend its jurisdiction without congressional authorization.

While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATV's in the field of mass communications, it seems to me that the present inquiry is too little and too late. It is too little because it does not deal with fundamentals. Many of the important issues in the field are mentioned in the notice of inquiry, but they are scattered through the somewhat diffuse discussion in random fashion, even occurring in footnotes. But the basic issues are not mentioned. These are what the function of CATV's should be, and what ultimate mode and system can be developed or encouraged to provide the greatest service to the greatest number. In various paragraphs of the instant orders and opinions CATV's are discussed as being ancillary or subsidiary facilities to broadcasting and as being a service competitive with broadcasting. These concepts seem inconsistent to me, and differing regulatory consequences flow from them. For example, if the services are truly competitive, then there is some reason to prohibit or discourage joint ownership of broadcasting facilities and CATV's. On the other hand, if the services are ancillary, then that reason does not exist, and broadcasters should be permitted, and perhaps encouraged, to own CATV's. At the present time the Commission is deferring action on a large number of broadcast license renewals because the licensees also own CATV facilities. This action seems inconsistent with some of the positions adopted in these proceedings.

In any event, the present inquiry is too late because the Commission has already formed its opinion on this subject. I believe the Com-

mission should make its investigation and conduct its inquiry before reaching its conclusions, rather than afterwards. The documents issued today plainly show that the Commission and its staff have strong and fixed views regarding the subordinate place of CATV's in the mass communications system, and these views are not likely to be much influenced by anything that can be presented to the Commission in the course of the inquiry. Even if some Commissioners hold such views, it would seem to me to be more courteous, more productive, and more wise to refrain from officially promulgating them until the formal "inquiry" has been completed.

In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in order to achieve economic and engineering objectives, or should exert direct control over the substance of programing in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of section 315 and "fairness," and section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station intends to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on nonduplication will welcome this new grounds for Commission regulation of their programing.

Even more provocative questions are posed with respect to political programing. Suppose a distant station, carried on a local CATV, is carrying a series of political programs on a presidential election which is balanced as between the major parties. A local station decides to carry those network programs presenting the views of one of the two major parties. It notifies the CATV which then blanks out these programs on its circuits. The local station will then have to balance out its own programing by presenting the views of the other major party over its broadcasting facilities. But the programs of the distant station carried on the local CATV will be unbalanced since they will present only the programs presenting the views of one party. Most important, the local public will then have an unbalanced presentation since it will have the programs favoring one party pre-

sented over two stations on the local system, whereas the programs favoring the other party will be presented over only one of the local channels and there will be only half as many of the latter. This is obviously a device that could easily be used to give the public a very biased political presentation during a campaign. Is the FCC then going to supervise CATV systems to see that their programs comply with all of the requirements of section 315 and "fairness"? How will this be accomplished? Will the FCC require program origination by CATV's? These and a host of other problems flow directly and inevitably from the approach adopted here. To say that any single situation is unlikely is not an adequate response. The records of the FCC and its own attempts to influence programming are eloquent testimony that situations such as those suggested, and others more bizarre and unusual, do occur and recur.

It should be noted that the rules now adopted by the Commission are based in significant part upon its concern for the preservation of "local live" programming, and that the notice of inquiry suggests that the protection which the Commission is now bestowing upon broadcasting stations is likely to be "accompanied by a concomitant duty on the part of the station" to provide "local live" programming. See notice of inquiry, paragraph 53. Thus, the nonduplication rule is not only a direct intrusion into the programming area through control of CATV's, but is also another argument to buttress the case for further Commission control of the programming of broadcasters. Believing, as I do, that the Commission should not seek to control program content in the field of broadcasting, I am opposed to this approach. See separate opinions in *Lee Roy McCourry*, 2 R.R. 2d 895 (1964); *George E. Borst, et al.*, FCC 65-207 (1965); *The Role of Law in Broadcasting*, 7 J. of Bdsting. 113 (1964); *Religious Liberty and Broadcasting*, 33 Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of consideration in the adoption of a nonduplication rule is that this is the approach which is most likely to provide incentive, if not virtual necessity, for CATV's to undertake the origination of their own programs. The operation of the nonduplication rule means that the CATV operators are required to delete material from the programs which they receive and deliver to subscribers and it also means that when such material is deleted the CATV is left with a vacant channel. While the economic pressures and motivations will undoubtedly vary from situation to situation, this kind of situation provides both the opportunity and incentive for program origination; and therefore, in the long run, is likely to engender more competition for the local television stations than it avoids. It seems to me to be far more simple and effective, not to mention wise and appropriate, to require that CATV's shall carry local stations, that they shall not alter or degrade the signals that they carry, and that they shall meet such other engineering requirements as may be found appropriate, and to leave determination of programming to the broadcasters without forcing the CATV operators into the area of program selection and encouraging them to enter the area of program origination.

1 F.C.C. 2d

The most important and fundamental legal objection to the present Commission action is its lack of adequate jurisdictional basis. The rule promulgated by the Commission at this time undertakes to regulate the programs that may be carried by CATV's by requiring common carriers that serve the CATV's to impose upon their customers, as a condition of service, the limitations contained in the Commission rules. The Commission has repeatedly rejected this basis of jurisdiction in the past, as appears from the cases cited and quoted below. But regardless of lack of support in precedent or statutory language, the logical implications of this approach should warn of its unsoundness. If the Commission can impose its will on a person or business entity that is the customer of a common carrier by the simple device of requiring the common carrier to act as the Commission's policeman in order to keep its license, then the Commission can regulate any business in the United States. Every business and most citizens are customers of the telephone and telegraph companies. It has never previously been suggested that this fact subjected them to regulation by the FCC. But if today's decision stands, then that is the law. The Commission need no longer be constrained by any technical limitations on its jurisdiction arising from statutes enacted by Congress, if this theory is sustained by the courts. The rule adopted by the Commission today applies to CATV's served by the telephone company as well as to those served by CATV relay companies. But there is nothing in the logic of the Commission's jurisdictional approach that limits this technique to CATV's. If this jurisdictional foundation is sound for CATV's, the Commission may, by precisely the same technique, impose its regulations on theaters or newspapers, on stock brokers or taxicabs, indeed on any business or person that needs and uses the services of a communications common carrier.

The Commission's assertion of direct jurisdiction over companies that receive broadcast signals and transmit them wholly by wire within a single State, without any specific statutory foundation, is equally alarming in its implications. The principal argument urged in support of the Commission's jurisdiction over such companies is that it is desirable for the FCC to have such jurisdiction in order to attain the broad general objectives of the Communications Act. However, if this reasoning is sound, then the jurisdiction of the Commission is literally unlimited. There is scarcely any aspect of organized social living that is not in some way related to the complex ramifications of the communications system that is now under the jurisdiction of the Commission. If the Commission has authority to deal with any activities which "threaten to impede realization of the Commission's * * * plan and policies" (memorandum on jurisdiction) then it can control all amusements, the field of journalism, the scheduling of movements by trains, planes, and ships, not to mention almost any other activities that is either competitive or ancillary to or an important user of communications. Such vague and broad reasoning simply will not sustain jurisdiction as to activities not plainly within the scope of some more specific statutory language. See *F.P.C. v. Panhandle Co.*, 337 U.S. 498 (1949).

When the Communications Act itself is examined it is found that not only is language lacking to give the Commission jurisdiction which it undertakes to assert here but the language of the statute expressly denies that jurisdiction.

Section 1 of the act, 47 U.S.C. 151, states the purpose of the act in most general terms and states that the FCC is created pursuant to this purpose. However, it does not define or confer any jurisdiction.

Section 2 of the act, 47 U.S.C. 152, says in its first subdivision that "the provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *." It does not state that the Commission has jurisdiction over all such communication. Rather it describes in general terms the scope of the act and the outermost limitations of its application. However, it says that within these outermost limits the act applies pursuant to its provisions. In other words, in order to find jurisdiction within the scope described by the first subdivision of section 2, it is necessary to find some specific provision of the act conferring jurisdiction.

This is emphasized by the second subdivision of section 2, which specifically says that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, * * * with facilities located in an adjoining State * * * of another carrier * * *." It would seem that the latter clauses specifically exclude both CATV relay companies and CATV's from the jurisdiction of the Commission when they do not use microwave. However, it is argued that the intrastate relay companies using wire, rather than microwave, are connected by radio with broadcasters in another State rather than with carriers in another State. The obvious answer is that at the time of enactment of the Communications Act such things as CATV's were unheard of and that the intent of Congress expressed in the second subdivision of section 2 is to deny the Commission jurisdiction over intrastate carriers which are not part of a single integrated system and which simply carry signals emanating from another State. The congressional intent to exclude the Commission from regulation of intrastate facilities and operations is indicated in a number of provisions in the Communications Act. In addition to the restrictions of 47 U.S.C. section 152(2), a statutory denial of Commission jurisdiction to regulate intrastate facilities or operations appears in 47 U.S.C. section 214, as to communications common carriers, in 47 U.S.C. 221(b), as to telephone companies, and even in 47 U.S.C. section 301(d), as to radio signals which do not have a direct effect on interstate communications.

However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only section 214, 47 U.S.C. 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission provided, however, that no authority from the Commission is required for the construction or operation of "a line within a single

State unless such line constitutes part of an interstate line." The section further provides that "As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels. * * *". Thus, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-State facility and the intrastate facility. The company which operates by wire within a single State is, therefore, specifically excluded from Commission jurisdiction by section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference that might otherwise be spun out of more general language that is claimed to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the definitions of "wire communication" and "radio communication" in 47 U.S.C. section 153, to the conclusion that the Commission has jurisdiction over CATV's because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. Many terms are defined in that same section, including the terms "United States," "person" and "State commission." It is obvious that the FCC does not have jurisdiction over the United States, over State commissions or over all persons. The terms defined have legal significance only to the extent that they are used in other sections of the statutes. But one will search the act in vain for any section which expressly confers jurisdiction upon the Commission in the broad terms mentioned in the memorandum on jurisdiction. Consequently, the definitions given those terms are not germane to the issue.

If the argument in the Commission's memorandum is correct, then the Commission has jurisdiction not only over intrastate wire relay systems and CATV operating systems but also over television and radio receivers. The argument made in the Commission memorandum is that any instrumentality which is incidental to or used in the process of transmitting picture or sound or which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction. Television and radio receiving sets are just as much within this jurisdictional concept as CATV's and broadcasting stations. In that event the "all-channel law" (Public Law 87-529, 47 U.S.C. 303(s)) was unnecessary as the Commission had full authority to regulate and license receivers by the terms of the original Communications Act. Clearly, neither the Commission nor the courts have ever previously thought this to be the case. Both have continuously acted on the contrary assumption.

The Commission itself has explicitly denied its right to control and its jurisdiction over CATV's in several decisions which up to the present time have not been specifically reconsidered or overruled. The first reported decision is *Intermountain Microwave*, 24 FCC 54, adopted January 30, 1958. In this case, a television broadcaster, Hill

County, objected to the grant of a microwave authority to a CATV relay company. The Commission opinion said:

Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are competitors of Hill County in endeavoring to provide visual entertainment * * *. We are of the opinion that the request of Hill County must be denied * * *. In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g., where the carrier already has in place properly authorized general cable, wire, or radio facilities which may be put to such particular use in the ordinary course of business. Thus, to single out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole user availing himself of service is a community television distribution system, would be arbitrary, capricious, and discriminatory. An alternative, of course, would be to adopt an overall policy, rule, or condition with respect to every cable, wire, or radio authorization, issued by this Commission to carriers under its jurisdiction, under both title II and title III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious, and discriminatory and unwarranted in view of our ultimate determination herein.

A few months later, in *Frontier Broadcasting Company*, 24 FCC 251, 16 R.R. 1005 (1958) the Commission specifically pointed out that even if it held CATV systems to be common carriers they would come within the scope of section 214 of the Communications Act and, therefore, would not require Commission authority to construct or operate intrastate lines. The Commission further said that when CATV systems transmitting signals by wire do not emit excessive radiation they involve no radio transmission which requires any form of license from the Commission under the act.

Thereafter the Commission conducted an extensive inquiry and after plenary proceedings entered a report and order considering the whole subject of CATV and repeater service, 26 FCC 403, 18 R.R. 1573 (1959). The following are some of the conclusions then reached and stated by the Commission:

* * * we find no present basis for asserting jurisdiction or authority over CATV's except as we already regulate them under part 15 of our rules with respect to their radiation of energy (par. 71).

* * * it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations (par. 77).

Certainly, with respect to anything more than the barring of simultaneous duplication, we believe this to be an unwarranted invasion of viewers' rights to get "live" programming if they are willing to pay for it. The suggested rules restricting presentation of the programs of the local station's network would appear to be cumbersome, if not completely unworkable, especially considering that many stations in small markets, including some of those covered in the record, present programs of two or even three networks (par. 96).

We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating

to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act, we will shortly recommend to Congress appropriate legislation, as indicated above (par. 99).* [Emphasis added.]

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that a grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment in *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket No. 12443, 26 FCC 403 (released Apr. 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the court of appeals six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp. v. FCC*, 321 F. 2d 359 (CA DC 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated " * * * several bills have been introduced in Congress to give the Commission direct authority over CATV's, a question not involved here, * * * " (FCC brief, p. 10.) [Emphasis added.]

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc. v. Fortnightly Corp.*, 23

R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV systems." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATV's through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcasting station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstance prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATV's was not involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did not have jurisdiction over the carriage of signals by CATV's. There is no reasoned Commission opinion that considers this issue and concludes that the Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn. v. U.S.*, 344 U.S. 298, and *NBC v. U.S.*, 319 U.S. 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen

by Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the Commission's memorandum is *F.P.C. v. Panhandle Co.*, 337 U.S. 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, *inter alia*:

Nothing in the sections indicates that the power given to the Commission over natural-gas companies by section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.

Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible mode of interpretation push powers granted over transportation and rates so as to include production * * * We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

The Court stated that if the Commission were of the opinion that it should have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the *Panhandle* case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in *Assignment of Additional VHF Channel to Johnstown, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control of CATV's or their practices does not indicate that the agency does possess such power. See *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATV's, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATV's as a service closely related to broadcasting. I favor and will support appropriate congressional legislation to give the Commission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional scheme by which Congress must specifically delegate power before

it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course than the one the Commission is now determined to follow.

At least part of the problem that the Commission now foresees in the proliferations of CATV's is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude toward translators and other auxiliary services that were within its jurisdiction that it now proposes to take toward CATV's. The popular demand which has been responsible for the recent rapid growth of CATV's has been largely the result of the denial of service to many areas because of the FCC strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country, but regulating the programs that can be brought into homes by CATV's and extending the Commission's jurisdiction without specific congressional authority are not likely to help.

However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts, and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific congressional authority.

AMENDMENT OF SECTION 73.606, TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS, DOCKET No. 14420

Petition for reconsideration of Sarkes Tarzian, Inc., seeking reversal of a denial of Tarzian proposal to shift channel 4 from Bloomington to Indianapolis, Ind., denied.

Section 73.636 of the rules.—Discussed.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 73.606, TABLE OF AS- Docket No. 14420
SIGNMENTS, TELEVISION BROADCAST STATIONS RM-287
(BLOOMINGTON-INDIANAPOLIS, IND.)

MEMORANDUM OPINION AND ORDER
(Adopted July 28, 1965)

BY THE COMMISSION: COMMISSIONER HYDE ABSENT; COMMISSIONER BARTLEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER LEE NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for reconsideration, filed by Sarkes Tarzian, Inc., licensee of station WTTV, channel 4, Bloomington, Ind., on November 13, 1962, seeking reversal of our action in the report and order, released October 12, 1962, herein (FCC 62-1076, 27 F.R. 10170, 24 Pike & Fischer R.R. 1517), denying a Tarzian proposal to shift channel 4 from Bloomington to Indianapolis, Ind. The channel shift was requested so as to permit station WTTV to move from its present transmitter site near Trafalgar, Ind. (some 26 miles northeast of Bloomington and 25 miles south of Indianapolis), to a new transmitter site (called the Hill Farm site) meeting spacing requirements, some 10 miles northwest of the center of Indianapolis in the vicinity of the sites used by the three Indianapolis VHF stations.¹ An opposition to the Tarzian petition for reconsideration was filed by Indiana Broadcasting Corp. (Indiana Broadcasting), licensee of station WISH-TV, Indianapolis, on January 25, 1963, to which Tarzian filed a reply on February 25, 1963.²

¹ A proposal to reserve channel 4 or one of the occupied Indianapolis VHF assignments for educational use was also considered and denied in this same decision, principally for lack of record evidence of educational support for it.

² After the closing date for the receipt of pleadings (Feb. 25, 1963), a letter opposing the Tarzian proposal was received Feb. 28, 1963, from American Television & Public Information Service, Inc., which has had an application on file for channel 39 at Indianapolis since Jan. 10, 1963. More recently, on Jan. 26, 1965, a letter was received from Tarzian which amplifies its suggested solution to an overlap problem which would exist between the grade B contours of Tarzian commonly owned stations if station WTTV were to operate from the proposed Hill Farm site. Copies of this letter were served upon Indiana Broadcasting and other participants in the rulemaking proceeding herein, and the Com-

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

FCC 66-220

WASHINGTON, D.C. 20554

In the Matter of:

AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS.

Docket No. 14895

AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS.

Docket No. 15233

AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS.

Docket No. 15971
(RM Nos. 636, 672,
742, 755, and 766)

SECOND REPORT AND ORDER

(Adopted March 4, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078), which divided the proceeding into two parts. In part I the Commission reached an initial conclusion that it has jurisdiction over all community antenna television (CATV) systems, whether or not microwave facilities are used, and proposed to extend to nonmicrowave CATV systems the substantive provisions of the carriage and nonduplication rules adopted for microwave-served CATVs in dockets Nos. 14895 and 15233. *First Report and Order* in dockets Nos. 14895 and 15233, 30 F.C.C. 683; *Memorandum Opinion and Order* in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. Part I also invited comment on various auxiliary questions affecting all CATVs which were not resolved in dockets Nos. 14895 and 15233. These have to do with color duplication, educational television stations, station-owned translators, and a possible transition period before the carriage pro-

visions are made fully applicable to existing CATV systems with limited channel capacity (notice, pars. 33-36).

2. In part II of the proceeding the Commission initiated an inquiry looking toward possible rulemaking on broader questions posed by the trend of CATV development, including (1) the effect of CATV entry into major cities on UHF independent stations, (2) the possible need for limitations on the distance a station's signal may be extended by CATV, (3) "leapfrogging," (4) program origination or alteration by CATV and the related question of pay-TV or combined CATV-pay-TV operations, and (5) various miscellaneous questions. In paragraph 49 of part II the Commission adopted an interim policy, pending the outcome of the proceeding, which provides that a microwave application to serve a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing was required for microwave facilities to serve a CATV system in an "overshadowed" community where, because of its proximity to three or more existing stations, any new UHF station would be independent in operation. In paragraph 50 of part II, the Commission proposed an interim rule along similar lines to govern nonmicrowave CATV entry into such areas.

3. Comment on part I and paragraph 50 of part II was due at an earlier date than that specified for the remaining portions of part II,² which, it was anticipated, would require more lengthy consideration and possibly a further notice to afford an opportunity for comment on any specific rule proposals of the Commission (notice, pars. 64, 68). Comments and reply comments on part I and paragraph 50 have now been fully considered by the Commission. This report and order deals only with these aspects of the proceeding.

PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage and nonduplication rules governing microwave CATV systems be extended to all CATV systems, the notice emphasized (pars. 27, 30) that two main issues were presented: (1) Whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether any special problems of substance or procedure are posed by rules going to nonmicrowave systems. We turn now to a discussion of the first issue.

5. The threshold jurisdictional question is twofold: (a) Whether the Commission has jurisdiction as a matter of law over nonmicrowave

¹ "Leapfrogging" means the distribution by the CATV system of more distant signals in preference to signals of stations located much closer to the system.

² Comments and reply comments on pt. I and par. 50 were originally due on June 25 and July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these times for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or reply comments have been received from the parties listed in the attached app. A. In addition, a large number of informal comments or letters from members of the public have been received and placed in the docket.

CATV systems under the present provisions of the Communications Act, and (b) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in dockets Nos. 14896 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966; in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." (Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its first session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31-39, within). We cannot ignore the increasing risk of adverse impact on the "public interest in the larger and more effective use of radio" (sec. 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116-117; part II, within. Further, it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in dockets Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in part I and paragraph 50.

A. Jurisdiction as a Matter of Law

8. While the comments filed in support of present jurisdiction outnumber those opposed,³ there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority

³ Supporting comments were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Aroostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; Rust Craft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; labor organizations affiliated with the AFL-CIO; Eastern Educational Network; and commenting jointly, television stations KHOU-TV; KOTV; KXTX; WANE-TV; WAVE-TV; WFIE-TV; WFRV; WISH-TV; WJXT; WMT-TV; WNOK-TV; WTOP-TV. Opposition—Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Entron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. Other—American Telephone & Telegraph Co. and U.S. Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

(notice, attachment B) or express agreement with that memorandum.⁴ Since we believe that the case for jurisdiction is sufficiently set forth in our memorandum, a copy of which is attached to this document for convenient reference (attachment C), we shall discuss only the arguments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal arguments. It is asserted, first, that the Communications Act contains no provision granting the Commission authority over CATV systems. Second, it is contended that there are specific provisions in the act which show a lack of authority. And, third, it is urged that the Commission itself has repeatedly denied jurisdiction over CATV systems, that Congress is aware of and has acquiesced in this administrative interpretation, and that principles of statutory construction foreclose the Commission from now claiming jurisdiction. We shall discuss these arguments in order.

10. The contention that the Communications Act contains no provision granting the Commission authority over CATV systems takes issue with the sufficiency of the statutory base set forth in the Commission's memorandum (pp. 2-7). We there relied on the fact that section 2(a) states that the "provisions of this act shall apply to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication," and concluded that CATV systems are engaged in "communication by wire," within the meaning of section 3(a), which is interstate in nature. With respect to the provisions of the act to be applied, we stated that the authority conferred by section 303(h) to issue rules establishing the area or zone to be served by any station includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act), and specifically a person subject to the provisions of the act, and encompasses authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV. Moreover, apart from section 303(h), the general rulemaking authority of the Commission (secs. 4(i) and 303 (f) and (r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support jurisdiction because it is necessary to find some specific provision of the act expressly conferring jurisdiction over the subject matter of CATV. The authorities cited in our memorandum (pp. 4-6) to the effect that our authority does not depend on a specific reference to CATV or CATV practices in the act⁵ are distinguished on the ground that they

⁴ While Storer Broadcasting Co. does not agree with the impact argument (Commission's memorandum, pp. 4-5) as a jurisdictional base, it takes the position that the Commission now has limited jurisdiction over all CATV systems which is sufficient to support the measures proposed in pt. I and par. 50.

⁵ *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203; *American Trucking Association v. United States*, 344 U.S. 298, 309-311; *United States v. Pennsylvania E. Co.*, 323 U.S. 612; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110; *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

concern authority over unspecified practices of regulated licensees rather than the power to regulate unspecified persons or businesses not licensed under the act. Unless specific authority is required for regulation of nonlicensees, it is argued, the Commission could utilize its general rulemaking authority to regulate any business (such as amusements, program producers, etc.) which has an impact on broadcasting or uses communications facilities.

12. The attempted distinction, even assuming arguendo its validity, does not fit the situation here. We are not presented with the question of whether the Commission's broad powers to take action necessary to carry out the provisions of the act include authority to regulate a business not subject to the act merely because of some impact on, or use of, interstate communications under the act.⁶ CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)).⁷ Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. Sections 312 (b) and (c) provide for the issuance of a cease and desist order against "any person"—not merely any "licensee or permittee"—who has "violated or failed to observe any rule or regulation of the Commission authorized in this act * * *."

13. It is further asserted that *Federal Power Commission v. Panhandle Eastern Pipeline Company*, 337 U.S. 498, precludes a conclusion that the general rulemaking power of the Commission encompasses authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) and 303(h) by CATV. However, the *Panhandle* case is readily distinguishable. That case was decided upon the basis of a specific provision in the Natural Gas Act which denied the Federal Power Commission jurisdiction to deal with the problem there involved.⁸ Section 1(b) of the Natural Gas Act provides that the "provisions of this Act shall apply * * * to the sale in interstate commerce of natural gas for resale * * * but shall not apply * * * to the production or gathering

⁶ We have not claimed plenary power to regulate any business which may have some impact on broadcasting or other interstate communication by wire or radio. In the jurisdictional memorandum we stated that the "Commission clearly has no jurisdiction over bowling alleys or theaters, for example * * *." Moreover, we sought and obtained specific statutory authority to regulate the manufacture of television receivers shipped in interstate commerce for sale to the public (Public Law 87-529, 47 U.S.C. 303(s)). There may be instances, of course, where the Commission's regulatory power appropriately extends to some activities of persons not engaged in communication by wire or radio. But there is no necessity to determine the limits or basis for such authority here.

⁷ Since CATV systems fall within the definition of communication by wire and their operations are interstate in nature, it makes no difference that they are not expressly mentioned by name. The act applies to "all interstate communication by wire or radio" and to "all persons engaged in such communication" [sec. 2(a), emphasis added]. For that matter, prior to the 1962 amendment incorporating sec. 303(s), the word "television" did not appear in the act. Yet, it has long been established that the act applies to television because it falls within the definitions of "radio communication" and "transmission of energy by radio" contained in sec. 3. *Allen B. Dumont Labs, Inc., v. Carroll*, 184 F.2d 153, 155 (C.A. 3), cert. den., 340 U.S. 929.

⁸ Other Federal Power Commission cases cited in the comments, *Amerada Petroleum Corp. v. Federal Power Commission*, 334 F.2d 404 (C.A. 8), and *Pan American Petroleum Corp. v. Federal Power Commission*, 339 F.2d 694, are similarly inapposite since they involved a lack of jurisdiction predicated upon a statutory exclusion.

of natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rulemaking powers, the court stated that the "power to do the things appropriate to carry out the provisions of the act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." [Emphasis added.] Moreover, *Panhandle* has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for resale in interstate commerce. *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 403-404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems is predicated primarily on the provisions of section 2(b) and section 214(a) of the act. Section 2(b) states that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities located in an adjoining State * * * of another carrier * * *." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission, provided, however, that no certificate is required for construction or operation of "a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly ruled that CATV systems are not "carriers" within the meaning of section 3(h) of the act. *Frontier Broadcasting Co.*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427-428; *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184; *Philadelphia Television Broadcasting Co., et al.*, FCC 65-702 (Aug. 2, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b) (1) because its physical facilities are located in only one State; it "performs an interstate communications service." *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; *Pacific*

Telatronics, Inc., 4 Pike & Fischer, R.R. 145; and cf. *California Interstate Telephone Co. v. Federal Communications Commission*, 328 F. 2d 816 (C.A.D.C.).⁹ See also, *United States v. American Telephone and Telegraph Co.*, 57 F. Supp. 451, 454 (S.D.N.Y.), aff'd *per curiam*, sub nom. *Hotel Astor v. United States*, 325 U.S. 837. By the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance is placed on the principle of statutory construction that a consistent, longstanding administrative interpretation is entitled to great weight, particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.¹⁰ Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of title II applicable to carriers. *Frontier Broadcasting Company*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427-428; *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. But we have not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. *Philadelphia Television Broadcasters Co., et al. v. Rollins Broadcasting, Inc.*, docket No. 15926 (FCC 65-702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.). Nor have we departed from our earlier rulings that CATVs are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.¹¹ Thus, while we initially

⁹ That the carrier in *Idaho Microwave* was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; *Capital City Telephone Co.*, 3 F.C.C. 189, 193-194; *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279. Moreover, in the case of network programming the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. *Ward, supra*, 300 F. 2d at 819.

¹⁰ Cases cited to us in this connection include: *Hanover Bank, Es. v. C.I.R.*, 369 U.S. 672, 686-687; *United States v. Leslie Salt Co.*, 350 U.S. 382, 396-397; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315; *Luckenbach Steamship Co. v. United States*, 280 U.S. 173, 183; *Cammarano v. United States*, 358 U.S. 498.

¹¹ The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in *CATV and TV Repeater Services*, 26 F.C.C. 403, the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover, bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in *Carter Mountain*. 29th FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 23, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the first session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (*Intermountain Microwave*, 24 F.C.C. 54; *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-433), this ruling was later reversed in our *Carter Mountain* decision, 32 F.C.C. 459, which was sustained on judicial review. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951. In *CATV and TV Repeater Services*, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (28 F.C.C. at 429)—a power which is not claimed here. However, we assumed (without deciding) that CATVs are within the scope of section 3(a) (26 F.C.C. at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 F.C.C. at 431). And, finally, we have not previously ruled on the question of whether section 303(h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951; *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672; *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 404-406.¹² As the Supreme Court commented in the *Phillips Petroleum* case, in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers for resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, footnote 5). Moreover, in *United Gas Improvement* the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of *Panhandle* (381 U.S. at 404-406). *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our memorandum as to jurisdiction (app. C), we conclude that CATV systems are engaged in interstate communication by wire to which the

¹² See also, *Calbeck v. Travellers Ins. Co.*, 370 U.S. 114, 127, footnote 15; *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 183; *Association of Clerical Employees v. Brotherhood of R. & S.S. Clerks*, 85 F. 2d 152, 156 (C.A. 7).

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that our statutory powers, particularly under section 4(i), 303 (f), (g), (h), and (r) include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed in part I and paragraph 50 of the notice are within our legal authority.

B. Assertion of Jurisdiction

20. We turn now to the further question of whether jurisdiction over nonmicrowave CATV should be exercised at this time. Most of the comments in support of jurisdiction favored an immediate extension of the carriage and nonduplication requirements to nonmicrowave CATV systems, and the adoption of an interim policy either along the lines proposed in paragraph 50 of the notice or of broader scope. However, some of the supporting comments and many of the opposition comments took the position that we should not exercise jurisdiction, even if present, until Congress has legislated on the subject. It is urged that this would provide needed policy guidelines and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome (i) a congressional guidance as to policy, and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest." In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field. The Commission has not been "left at large" as to the criterion to be following in performing our statutory duties in the dynamic communications field. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-220. The public interest touchstone provided by Congress afforded a sufficient standard for our decision to adopt the carriage and nonduplication requirements for microwave-served CATV systems in the first report and order in dockets Nos. 14895 and 15233. Since the "considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service apply equally" to nonmicrowave CATV systems (notice, par. 27), there is likewise a sufficient standard for judgment here. Finally, our action with respect to the paragraph 50 proposal is similarly dictated by the "public interest in the larger and more effective use of radio" (sec. 303(g)).

22. Most of the comments agree that, apart from the basis for jurisdiction, there is no significant difference between microwave and nonmicrowave systems. However, National Community Television Association, Inc. (NCTA), asserts that there is no basis for assuming

they are alike. It points to no factual distinction. Rather, NCTA renews its contentions in dockets Nos. 14895 and 15233 that no adequate factfinding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House subcommittee in hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programming. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104-109), and has found that the data developed by the Commission supports its conclusion that delayed programming occurs most frequently among affiliates in the mountain time zone, and there in one- and two-station markets. NCTA claims that its study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendixes do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity of the first report and order in dockets Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.¹⁵ Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds of our decision, namely, (i) the fair competition ground, and (ii) the economic impact ground, *based on the CATV trend in recent years*. Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in dockets Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off the air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

*** Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and

¹⁵ We have decided, for the reasons set forth in pars. 47-55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV (pars. 49-57, 76), and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential (pars. 58-75, 77).

26. With respect to the first ground, we found that the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers (par. 51). We stated (par. 57):

As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. * * *

Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible would we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its normal program distribution process and fails to recognize the reasonable exclusivity for which the local stations have bargained in the program market when it duplicates local programming via the signals of distant stations (pars. 52-56). We summarized our conclusion that this was unfair and inconsistent with CATV's supplementary role as follows (par. 57):

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on re-broadcasting is the same.

Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience

for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. [Footnotes omitted.]

28. We stated that the foregoing grounds were "enough to justify regulatory action" (par. 58) and that "every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station" (par. 76). But, as stated, we also turned to another ground based on the economic impact of CATV upon television broadcast development. We considered at some length the data and arguments before us on the question of impact (pars. 58-75), finding—as in 1959—that it is "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings" (par. 68). However, taking account of nationwide trends affecting the nature of CATV offerings, the character of the markets entered, and the degree of penetration achieved, we also found it plain that CATV could have a substantial negative effect upon station revenues and audiences even though we lack the tools to measure precisely the degree of impact (pars. 65-69). We further found reason to believe that the impact was likely to be "more serious in the future than it has been in the past" (par. 69), and stressed our concern with the effect of explosive CATV growth in a critical period for UHF development (pars. 71-72). In sum, the Commission's judgment on this ground was based very largely, not upon the past, but upon the trends which were already evident and whose dimensions called for action now to assure the public interest in the future.

29. The additional showing made in the appendixes to the NCTA comments is not directed to the above crucial considerations concerning the trends in the CATV or UHF fields. Instead, it focuses upon certain situations which, it claims, establish that CATV has no adverse impact upon television broadcasting. But each of its examples is sharply disputed by AMST, which points to significant impact in some cases or sets forth other factors for the improvement in the situation of the television station in the face of CATV competition. For example, AMST notes that several stations whose network hourly rate has not declined since 1960 were already at or near the minimum rate for the network involved (AMST reply comments, pp. 27-28, attachment A, pp. 10-14). It attributes whatever success station WLUC-TV, Marquette, Mich., has enjoyed in recent years to new management beginning in 1960 and states that the station has suffered a decline in average quarterly hour audience while local revenues have

remained stagnant (AMST reply comments, pp. 29-30, attachment A, p. 14). AMST also points out that WBOC-TV, Salisbury, Md., following a change in ownership in 1961 and the infusion of a substantial financial investment, extended its hours of operation, improved its programming, and doubled its service area through a substantial power increase. (AMST reply comments, pp. 31-32, attachment A, pp. 15-16.)

30. It would, we think, serve no useful purpose to delve into each of those situations. For even assuming that it were possible to isolate the significance of CATV in each situation from other factors (as it was feasible in the *Carter Mountain* case, first report, par. 64), it would not afford greater insight into the crucial aspect of the matter—the explosive growth and changing character of CATV and its possible impact upon television broadcasting in the future. And, as to that aspect, events since the issuance of the first report reinforce the judgment made by us upon the basis of the above-mentioned trends in the industry. For, as the comments in this proceeding show, without dispute in this respect, the trends described in paragraph 65 of the first report have become even more pronounced. We shall briefly review those trends in light of their importance to our judgment.

31. In the first report we relied on estimates in the Seiden report which were based on data compiled in 1964.¹⁴ The Seiden report stated (p. 2) that there were approximately 1,300 CATV systems serving approximately 1.2 million TV homes. The reply comments of AMST, filed on September 17, 1965, contain the following estimates as of mid-1965 (AMST reply comments, attachment A, prepared by Economic Associates, Inc., of Washington, D.C., using data from Television Factbook (No. 35) and Television Digest):

Communities with operating CATVs	1,847
Communities with CATVs franchised (but not yet operating)	758
Communities with CATV applications pending	938

While these figures are not tendered as precisely accurate,¹⁵ the rapidly accelerating rate of growth is confirmed in statistics given by licensees commenting on the situation within their service areas,¹⁶ in the trade press, and in letters received by the Commission from local franchising authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is increasing. According to the Seiden report (pp. 2, 54) the usual CATV system in 1964 delivered five signals and 85 percent of all systems delivered between three and seven signals. However, there is indication in the record that most of the new CATV systems have a channel capacity of 12 channels and many of the older systems are expanding their original capacity. The AMST reply comments (attachment A) contain the following table showing the cable capacity for the 753 CATV systems for which it was able to obtain data:¹⁷

¹⁴ This estimate was based on comments filed in dockets Nos. 14895 and 15233 and the report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry" (Government Printing Office, February 1965), hereafter referred to as the "Seiden report."

¹⁵ There are other estimates (see par. 116, describing the Television Digest estimate), but whatever the estimate, CATV growth is clearly explosive in nature.

¹⁶ E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WKBH Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

¹⁷ The data were compiled from reports in Television Factbook (No. 35), Television Digest, questionnaires on file at the Commission, and ARB publications.

CATVs starting	Capacity, in number of channels (including FM) ¹											
	2	3	4	5	6	7	8	9	10	11	12	
Thru 1951		3		28	2	1					13	
1952		3		26		1	1				15	
1953		3	1	36	1	4	1	2	1		10	
1954	1	5		39	3	3		2	1		20	
1955		5		43	2	2		4			11	
1956		3	1	30				1			10	
1957	1			23		3	1		1		8	
1958		2		27	1		1		1		7	
1959			1	28			1	1			4	
1960		2		26		2	1	1			6	
1961				21		1			1		9	
1962	1			25				1			16	
1963				21	1	1	1				38	
1964				15	1	2	2	9		3	53	
Thru July 1965				5		1	2	1			44	
Totals	3	26	3	393	11	21	10	22	5	3	256	

¹ Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

The expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See pars. 103-107, within.)

33. It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized, or applied for as of July 8, 1965, and indicate the extent of colocated CATV activity (AMST comments, attachment C, table 2).¹⁸ The results are summarized by AMST as follows (comments, p. 59):

There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112 million. The cities and metropolitan areas with CATV systems operating, pending, or applied for account for at least 85 million people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized, or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.

34. The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of VHF station WCIA, Champaign, Ill.; UHF station WMBC-TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.¹⁹ Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.²⁰ Franchise applications have been filed or proposed in at least 12 communities within the WCIA grade B service area, and CATV systems are operating, under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of

¹⁸ According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

¹⁹ Midwest is also the licensee of KFMB, San Diego, Calif.

²⁰ Champaign has one VHF and one UHF station, and is also the location of a UHF translator of a Decatur UHF station.

the total population within WCIA's grade B service area. Within the grade B service areas of WMBD-TV, Peoria, and of W71AE, Midwest's La Salle translator, CATV is at various stages—from franchise proposals to actual operation—in at least five communities, including Peoria itself (which has three operating UHF stations and a vacant UHF commercial assignment). The total urban population of these five communities is 221,294—between one-third and one-half of the total population in the grade B service areas of WMBD-TV and the La Salle translator. In Springfield (which has one operating UHF station and applications pending for two new UHF stations), applications for CATV franchises are under active consideration in Springfield and another community located in the grade B contour of both proposed UHF stations. The total urban population of these 2 cities is 92,072—approximately one-half of the total population within the grade B contour of Midwest's proposed new UHF station. Midwest states that the proposals for CATV in Springfield, Peoria, Champaign, and Urbana have all been announced since April 23, 1965, and that at least eight new CATV operators filed applications for local franchises in central Illinois during the first 2 weeks of July.

35. A description of CATV growth in the Rio Grande Valley of Texas is given by Mobile Video Tapes, Inc., the licensee of KRVG-TV in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, Weslaco has a 1960 census population of 15,649 and the population of the Harlingen-San Benito urbanized area is 61,658. It states that J. Walter Thompson Co. (*Population and Its Distribution, The United States Markets*, 8th ed., 1961), lists the Brownsville-Harlingen-San Benito market (which includes Weslaco) as a class "C" market, the 143d market in the United States, with a population of only 151,098. The ARB total net weekly circulation of KRGV, as of March 1964, was only 75,100 homes. CATV franchises have been granted in five towns within its service area and other CATV systems are proposed. The communities with CATV franchises, their populations, and the grade of KRVG coverage are given by Mobile Video Tapes as follows:

Community	1960 census population	KRVG coverage
Brownsville.....	48,040	Grade A.
Edinburg.....	18,706	City Grade.
McAllen.....	32,728	Grade A.
Mission.....	14,081	Grade B.
Pharr.....	14,106	City Grade.

Mobile Video Tapes points out that this "constitutes the heart of the market—84.4 percent of the population shown by J. Walter Thompson for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activity in the vicinity of fairly large cities with multiple channel assignments. The AMST comments (attachment C, tables IA, B, and C)²¹ tabulate the CATV systems in operation, franchised or applied for within the

²¹ Corrections to these tables were supplied in an "addendum" to the AMST comments submitted on Aug. 12, 1965.

grade A and B contours of existing or potential VHF and UHF stations in 11 areas "believed to be centers of considerable CATV 'activity'": Bakersfield and Sacramento, Calif.; Orlando and St. Petersburg, Fla.; Rockford, Ill.; Evansville and Indianapolis, Ind.; Rochester and Utica, N.Y.; and Columbus and Dayton, Ohio. The extent of CATV penetration is detailed in tables IA, B, and C. All three give separate figures for grade A and grade B contours, for VHF and UHF respectively. Table IA shows the penetration in terms of number of places in which CATV franchises have been granted or applied for. Table IB gives the equivalent data in terms of potential CATV households²² compared with the total number of households within broadcast contours. Table IC converts the data in IB to percentages of total number of households within the broadcast contours.

37. The analysis shows that in these 11 areas there are approximately 230 places in which a CATV system was operating, franchised, or proposed (as of July 8, 1965) within the grade B contours of existing or potential VHF and UHF stations located in the central community of each of the 11 markets. These 230 places contain nearly 1,900,000 households. In Bakersfield, Calif., an all UHF market, almost two-thirds of the potential UHF audience is already franchised to CATV systems. In Utica, N.Y., the figure is 44 percent. If already submitted or proposed applications result in franchises, a UHF station in Columbus, Ohio, would have CATVs potentially competing for 60 percent of its market and a VHF station for more than half. Existing and pending CATVs in the Indianapolis area involve half the VHF market and about three-fifths of the UHF market. In Sacramento, the CATV potential comes to over 40 percent of the UHF market and nearly half the VHF.

38. There is also widespread CATV activity within major cities. Our attention has been called to the asserted intent of CATV interests to wire up "almost all American cities—small and large" and 85 percent of all television sets—40 million homes.²³ The December 1965 issue of *Television Magazine* (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and the grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, permittee of new UHF station WDHO-TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and—according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, off the air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing

²² The tables use potential, rather than actual audience, i.e., the total number of households within the broadcast contour, and the total number of households in the community of the CATV.

²³ Address by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted in *Television Digest* special supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.

its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for two new UHF facilities.²⁴ Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (file No. 6226-C1-P-65) to bring the three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Lackawanna and Luzerne Counties. The Scranton-Wilkes-Barre area is served by three UHF stations, providing three full network services.

39. The most factually detailed comments on big city CATV were submitted by Midwest Television, Inc., licensee of station KFMB-TV in San Diego, Calif. According to Midwest, CATV is growing with great speed in the San Diego area, which is presently served by three VHF stations providing the programs of all three networks.²⁵ In addition, construction permits are outstanding for two new commercial UHF stations in San Diego and an application is pending for a UHF educational station. Since March 1963, when the first CATV system in the area was franchised, seven additional systems have been franchised. All eight CATV systems are within the grade A contour of KFMB-TV, which falls within the Metropolitan San Diego area; four are located in San Diego itself. While four of the eight systems are not yet operative, two of these are expected to begin operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles commercial VHF stations and carry the local stations without affording non-duplication protection. Midwest has been unable to obtain the current subscriber count, estimated at approximately 10,000 homes in February 1965.²⁶ However, its engineering personnel recently counted drops in a part of San Diego where CATV had been available for only 3 months. Of the 159 homes in that area, 58 were wired for CATV—and this, Midwest points out, “is an area where all three stations can be satisfactorily received” (Midwest comments, p. 24).

40. The Midwest comments also describe what it considers to be the effect CATV operations of this nature have on the audience of the local network-affiliated stations. Southwest Surveys, an independent research organization, conducted a survey for Midwest in June 1965, interviewing 300 CATV subscribers and 300 nonsubscribers in the San Diego area. Forty-three percent of the CATV subscribers had been subscribers for less than 3 months. Midwest states (comments, p. 9) that during the prime evening hours of 7:30 p.m. to 11 p.m., when most of the programs broadcast by the three San Diego area stations were network programs, the San Diego area stations accounted for 88

²⁴ Telerama plans to carry all local stations and two Canadian stations on a full-time basis and to carry on a part-time basis on the remaining channels the signals of network affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. While it does not propose to acquire microwave facilities to bring in Chicago and New York independent stations, Telerama states that if these signals are made available to the Cleveland area by common carrier facilities, “then Telerama may avail itself of the accessibility to such signals.” Since Telerama submitted its comments, Cleveland has granted a franchise to Telerama.

²⁵ Midwest's station KFMB-TV is a CBS affiliate. KOGO (San Diego) is an NBC affiliate, and the third station, KETV (located in Tijuana, Mexico, just a few miles from San Diego), is an ABC affiliate.

²⁶ San Diego Telecasters, Inc., permittee of UHF station KAAR-TV in San Diego, estimated as of Aug. 25, 1965, that there are “more than 15,000 sets now served by cable.”

and 97 percent of the total viewing time of non-CATV subscribers interviewed in two different areas and only 62 percent among cable subscribers. During the hour from 9 p.m. to 10 p.m., Sunday through Wednesday, when each program broadcast by each of the San Diego area stations was simultaneously duplicated on CATV by Los Angeles stations, 93 percent of the nonsubscribers saw them on local stations whereas only 77 percent of the cable subscribers did so (pp. 9-10). Of the cable subscribers, 49 percent reported that they viewed a San Diego channel most; 55 percent named a Los Angeles channel. Of the nonsubscribers in two separate areas, San Diego stations were named by 108 and 94 percent, respectively, while Los Angeles stations were named by only 5 and 11 percent (*id.*, p. 25).²⁷

41. With respect to nonnetwork viewers, Midwest states that 25 percent of the CATV subscribers named a Los Angeles independent station as the channel they viewed most and only 1 and 2 percent, respectively, of the two groups of nonsubscribers did so. More than 56 percent of the CATV subscribers (as compared to 11 percent of the nonsubscribers) named at least one Los Angeles independent as one of the three stations most viewed (*id.*, p. 26). During the period 5 p.m. to 6 p.m., Monday through Friday, there was no duplication by any Los Angeles station of programs broadcast in San Diego and the cable subscriber could watch any one of 10 different programs. Among nonsubscribers interviewed, 95 percent of those who watched television during that hour watched one of the San Diego stations. Among cable subscribers the Los Angeles stations accounted for 52 percent and the San Diego stations 48 percent (*id.*, pp. 26-27).

42. Moreover, appended to the comments of Columbia Broadcasting System (CBS), which is opposed to an assertion of jurisdiction, is a further study of CATV prepared by its office of economic analysis. The CBS study points out that there is a timespan lag before CATV impact is felt (CBS comments, exhibit A, p. 27). This is partly because CATV penetration does not occur all at once; growth is gradual. But CBS also states that networks react slowly to changes in station audiences and that it might take 3 to 5 years for a change in an affiliate's audience to be reflected fully in the relative network rate. National spot revenues and local advertising, while reacting more quickly, would still take a considerable time. The study concludes (p. 31) that the "true reasons for the modest impact of CATV thus far are the relatively small amount of penetration that CATVs generally have in any particular market and the considerable length of time necessary for the effects of CATV to work themselves out."²⁸

43. Like the Seiden report, the CBS study bases its discussion of CATV potential and impact on CATV systems operating or franchised as of August 1964. It concludes, therefore, that CATV potential is limited to communities more than 40 miles from three stations providing the service of the three networks (plus some metropolitan

²⁷ Percentages total more than 100 percent because some multiple answers were given.

²⁸ AMST argues that this timelag is not as great as CBS asserts. It states (reply comments, p. 22): "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by sharp decreases in station orders long before those stations' network rates were affected."

area apartment-house dwellers), an estimated 6-8 million TV homes. However, the study recognizes (p. 14) that CATV "systems are clearly moving closer to transmitting points" and states further (pp. 16-17):

There is a final caveat that must be made at this point. There has been in the very recent past, and not included in the systems in our study, a group of applications for CATV systems in communities with three more than adequate network services which do not appear to be related to apartment-house reception problems. Thus, applications for franchises have been made in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland, and a franchise has just been granted in Wilmington, Del. . . . While these do provide alternative programing, we do not know as yet whether this added factor will be sufficient to make the systems viable. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory."

44. In view of the rapidly changing circumstances outlined above, we can see no point in conducting a further factfinding inquiry with respect to nonmicrowave CATV as it has existed in the past. The extensive studies conducted by Dr. Fisher, Dr. Seiden, and NCTA in conjunction with dockets Nos. 14895 and 15233,²⁹ and further studies of CBS and AMST in this proceeding, all concerned nonmicrowave as well as microwave CATV systems. Studies of this nature are out of date almost before we have had time to consider them. Moreover, they are of limited value since they cannot measure some of the most important factors we are bound to consider. These include the cumulative future effect of greater penetration by CATV systems franchised or applied for but not yet in operation, the degree of success to be achieved by CATV systems in big cities or other well-served areas, and the effect of the burgeoning CATV activity—if left unregulated—on the decisions of potential applicants and existing licensees as to whether to inaugurate or improve service.³⁰

45. What we said in the first report and order in rejecting NCTA's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to cease operation, applies with equal force to its renewal of that argument here.³¹ We stated (par. 77):

²⁹ See, e.g., paras. 20 and 32 of the first report and order in dockets Nos. 14895 and 15233, and p. 49 of the Seiden report.

³⁰ The CBS study further asserts (pp. 27-30) that the effects of a rise in CATV penetration with its depressing effect on station revenues are offset in large degree by the persistent rise in advertising demand for television time. However, as AMST points out, the number of stations sharing the advertising demand is also increasing as new UHF stations stimulated by the all-channel law commence operations. Moreover, annual broadcast expenses are on the average increasing apace with revenues.

³¹ While the distant signal procedure adopted in pt. II will probably have some effect on the trends we have been here discussing, we think that application of the carriage and nonduplication requirements to all systems is still required in the public interest. First, not only will this end the present unwarranted discrimination between the microwave and nonmicrowave system, but it is called for on the basis of the fair competition ground, discussed in para. 26-27. Second, as to the economic-impact ground we note that in view of recent growth, there are a very substantial number of CATV systems operating on the date of release of this report with the capacity to keep growing to perhaps 50-70 percent of the television homes in their communities, and thus to have a cumulative effect in areas such as those noted in the prior discussion (e.g., paras. 35-37). New systems will continue to come into operation under the interim procedure, and it may be important that the cumulative effect of such systems, after growth to significant figures, be ameliorated to some extent by the carriage and nonduplication requirement. Most important, the distant-signal procedure is of interim nature, subject to discontinuation or revision. See par. 150. The carriage and nonduplication rules which we adopt here are not interim—they are our best judgment of what the public interest calls for over an indefinite period.

NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of insuring the healthy growth and maintenance of the basic service.

46. In sum, we have concluded in the first report and order in dockets Nos. 14895 and 15233 that the public interest requires that CATV systems carry local stations without duplication for a reasonable period, in order to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service. We have concluded herein that we have authority under the present provisions of the Communications Act to extend these requirements to non-microwave systems. In view of the rapid surge in CATV growth since this proceeding was initiated, we think that our statutory obligations require us to act now in the areas we have proposed. This will end the present unwarranted distinction between microwave and nonmicrowave systems, and will enable us to make the rules effective before operations are commenced by a large number of CATV proposals presently in the franchise or application stage.

C. Substantive Provisions of the Rules

47. CATV systems, as we recognized in the first report (pars. 43, 48) and here again emphasize, have arisen in response to public need and demand for improved television service and perform valuable public services in this respect. CATV (like other auxiliary television services) makes possible the provision of a variety of program choices, particularly the three full network services, to many persons in areas with no local station and in one- and two-station markets. CATV systems also afford a means of providing nonnetwork commercial and educational services to many persons in areas with insufficient population to support local broadcast outlets of this nature. CATV systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, manmade structures, or other factors. We do not intend to deprive the public of these important benefits or to restrict the enriched programming selec-

tion which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the act), both those who are cable viewers and those dependent on off-the-air service. The new rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

48. To insure effective integration of CATV within a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.³² We have carefully reexamined the CATV rules currently in effect for microwave-fed systems, and have made some changes. The microwave rules will be revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B contours the CATV system is located, in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 p.m., eastern time) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Nonduplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system. Ad hoc consideration will be given to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules, and we are adopting procedures to facilitate such petitions. Moreover, the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules.³³

50. Thus, the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's first report, except in certain minor respects discussed in paragraphs 74 and 83 below. However, the new nonduplication rules embody two substantial changes from those adopted in the first report. First, the time period during which nonduplication protection must be afforded has been reduced from 15 days before and after local broadcast to the single day of the local broadcast. Second, a new exemption from the nonduplication require-

³² Excluded from these rules will be those CATV systems which serve less than 50 subscribers, or which serve only as an apartment-house master antenna.

³³ Private agreements will not avoid the necessity for evidentiary hearing for the importation of distant signals into the top 100 markets (pt. II, below), though such agreements will be considered in our decision.

ment has been added as to color programs not carried in color by local stations. We shall discuss the nonduplication changes first because they are of a major nature.

1. The nonduplication provisions

51. *Modification of the nonduplication period.*—Nonduplication at the same time that a local broadcast is being carried on the cable is clearly called for in the public interest for the reasons discussed above and in the first report. Simultaneous nonduplication protects the bulk of the popular network programming of most network affiliates and does not affect the time that such programming is available to the CATV subscriber. In the first report we further determined that some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds. We shall not repeat here the reasons set forth in the first report for that determination or for the further judgment that a 15-day before-and-after period was appropriate.

52. We have reconsidered the latter judgment and have decided to strike a different balance in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public. The systems which will now operate under the rules for the first time constitute the great bulk of the CATV industry. In addition to all non-microwave systems, they include a sizable number of microwave CATVs served pursuant to authorizations granted prior to December 1963 when the interim condition procedure began. We recognize that the imposition of a 15-day before-and-after nonduplication requirement on systems which have not previously operated in this manner would tend to substantially disrupt the viewing habits of the CATV subscribers. As NCTA points out (NCTA comments, exhibit B, pp. 35-38), there is no question but that large numbers of CATV subscribers have become accustomed to viewing network programs at the time they are presented by the distant affiliates. Although 15-day before-and-after nonduplication was not required where timeliness was important, and all distant city programs deleted under the rules would have been available to the CATV subscriber via the local signal at some time within the total 30-day period, the CATV viewer might not be able to view it on the later date of presentation by the local station for any number of personal reasons.

53. We believe it desirable to avoid disruption to the established viewing habits of the public as much as possible. Moreover, we are seeking to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day. Balancing all the pertinent considerations, we think that the nonduplication period should be reduced to the same day for existing systems. Not only will this eliminate the great bulk of delayed nonduplication requests (see par. 125, first report), but it will insure that the program is available to the CATV audience that same day and, in the case of network prime-time programs, that same evening. While not wholly eliminating any possible change in viewing time on the pertinent day, this revision clearly minimizes any disruptive effect on

the CATV viewer. As an incidental benefit, we note that same-day nonduplication will substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules, and to this extent will facilitate ease of administration.

54. Application of a 15-day before-and-after nonduplication provision to new systems would not, of course, cause a similar disruption to established viewing habits, since the CATV subscriber would from the beginning receive service in accordance with the rules. It would be possible to "grandfather" existing systems on a same-day nonduplication basis and make 15-day nonduplication effective only as to new systems. But there are a number of countervailing arguments. First, even in the case of the new system, there is disruptive effect to the extent that the CATV subscriber may not be able to view programs from distant stations at the times specified in his TV guide (and may be unable to view them at the later date presented by the local station for any number of reasons). It is our understanding that it is essentially for that reason that some broadcasters, although previously entitled under our microwave rules to 15-day before-and-after nonduplication protection, have requested only simultaneous nonduplication. Second, it is obviously preferable to have one set of rules for all systems and thus to avoid the anomalous situation of millions of CATV subscribers viewing under one set of rules and other millions, often neighbors in close-by communities, subjected to a different set. Under the circumstances, we think it better to provide by rule for same-day nonduplication for all systems, and to safeguard the public interest in the particular instance warranting different treatment pursuant to the ad hoc procedures discussed in paragraph 97 below.

55. We also considered the question of retaining the 15-day before-and-after nonduplication provision for nonnetwork programing. But, as we have previously recognized, and indeed stress in this report (pars. 123, 131, *infra*), 15-day before-and-after nonduplication affords, at best, only minimal protection with respect to the presentation by local stations of syndicated and film programing. Such programing is not presented on a nationwide simultaneous or even nearly simultaneous basis. Retention of the 15-day provision for nonnetwork programs alone would serve little effective purpose. Stated differently, the adoption of a uniform "same day" rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programing. Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. We treat the situation of the independent station in part II below.²⁴ As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace. Here again, we shall consider requests seeking more extensive protection of nonnetwork programing on an ad hoc basis to

²⁴ With "same day" nonduplication affording substantial protection to the most popular network programing, most network affiliated stations should be viable.

insure that the public interest is not prejudiced in the unusual situation (although, as stated, we are unaware of any instance where the 15-day period afforded effective relief in this respect).

56. While conflicting considerations are presented, we believe that our resolution constitutes a fair compromise. First, same-day non-duplication is clearly sufficient to take care of the time zone differential problem, i.e., to preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally. Moreover, it will afford the station affiliated with more than one network some leeway in presenting what it regards as the most attractive programs of each for the benefit of the non-CATV audience (and also, the CATV audience—see par. 115, first report) so long as such programs are presented on the same day as the network presentation and prime-time programs are broadcast entirely within prime-time hours.³⁵ This will, as stated, minimize any disruption to the CATV subscribers. In addition, we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97, where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programming by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest. Similarly, the CATV system can seek a waiver of the rules. We stress, in addition, that the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. We believe that the above resolution fairly serves the public interest. If further revisions are needed on the basis of our experience with these new provisions, we shall of course move promptly to implement such revisions.

57. Our decision to adopt same-day nonduplication makes appropriate some other revisions in the exclusivity sections of the rules. First, however, we stress those provisions which remain unchanged. We shall retain the provision requiring the local station to present prime-time network programming entirely within prime-time hours in order to be entitled to nonduplication.³⁶ Thus, the CATV system

³⁵ In this connection, we note that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there will be some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we would not expect the local station to cease all delayed broadcasts in the absence of delayed nonduplication protection. Moreover, the pending liberalization of our translator policies may result in greater availability of off-the-air service in one- and two-station markets.

³⁶ AMST has requested elimination of the exception for prime-time programs broadcast outside of prime-time hours. AMST urges that this provision is unnecessary because it is normally in the best interests of the station to carry prime-time programs in prime hours and the Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not preclude the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime-time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.

need not delete reception of any network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but which is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for the network programing in the time zone involved. This will insure that such programs are available to the CATV subscribers in maximum viewing hours. We shall also retain the provision that the CATV system need not delete reception of any program as to which time of presentation is of special significance, such as a speech or sporting event, except where the program is being simultaneously broadcast by the local station. And, although it is of greatly reduced significance for same-day nonduplication, we shall retain the provision that the CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusively is being protected pursuant to the requirements of the rules).

58. However, there no longer appears to be any real necessity for the provisos to sections 21.712(g), 74.1033(e), and 91.559(e), i.e., that:

(1) The system is not required to maintain the exclusivity of the network programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programing of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the non-network programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

These provisions were grounded in the 15-day before-and-after non-duplication period which protected network programs delayed substantially beyond the date of network presentation and protected nonnetwork programs for a total of 30 days. In view of same-day nonduplication, we shall provide simply that higher priority signals carried on the system are entitled to exclusivity against lower priority or more distant signals but not against signals of equal priority.³⁷

59. *Color duplication.*—In the first report and order in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (par. 143). However, we did not there determine whether such an exception should apply across the board or whether the CATV system should be required to make a threshold showing that a certain number or percentage of its subscribers possess color receiving sets. Comment on this question was invited in this proceeding.

60. Most of the comments, from broadcast and CATV interests alike, favor permitting color duplication on an across-the-board basis.

³⁷ Though these modifications stem from our action in shortening the nonduplication period, we note that changes of this nature were requested by AMST and ABC under the 15-day before-and-after nonduplication period.

No one has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programing to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

61. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programing and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave-served CATVs will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

62. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good-faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

63. *Other changes in the nonduplication provisions suggested by the parties.*—The comments of NCTA (exhibit B, pp. 35-38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching device or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of non-

duplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switching device only once for the entire week. Accordingly, we shall amend section 21.712(h), 74.1033(f), and 91.559(f) to require that the station, upon request of the CATV operator, shall give notice under these sections at least 8 days prior to the broadcast to be deleted. Since same-day nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the network season, this amendment should pose no difficulty for the station.³⁸ Indeed, in most instances it would appear that such notice could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

64. AMST urges that the rules be modified to provide nonduplication protection to local stations which are not carried on the cable—either because no request has been made or because of the limited channel capacity of the system. It states that carriage has no essential relationship to nonduplication and should not be a condition of the latter. We cannot agree. If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. See paragraph 51, first report. This is not the purpose or effect of the rules as written, nor would it serve the public interest. As set forth in paragraph 68 below, the better procedure where the system's channel capacity is too limited to permit full carriage of the local station is to substitute its programs for the duplicating outside signal. Partial carriage would retain the availability of the programs to CATV subscribers and at the same time afford the station some measure of protection.

65. Other changes in the nonduplication provisions requested by AMST and ABC have been rendered moot by our action in shortening the nonduplication period to 1 day and the modifications we have made in that connection. Accordingly, we shall not discuss their contentions in this respect. The comments with respect to nonduplication of noncommercial educational stations are discussed in a separate section on educational television (sec. 4 below).

2. The carriage provisions

66. We shall, as stated, apply to all CATV systems substantially the same carriage requirements as were adopted for microwave-served systems in the first report.³⁹ Thus, within the limits of its channel capacity, a CATV system will be required to carry the signals of all commercial and educational television stations within whose grade B contour the system is located, giving priority: First, to principal community signals; second, to grade A signals; and third, to grade B signals. The CATV system need not carry the signal of any station,

³⁸ It has come to our attention that the requesting station may have difficulty in giving notice where the CATV does not always carry the same signals. Where a CATV system varies the signals carried, it should provide the local stations with a copy of the CATV schedule in sufficient time to permit the station to give notice of the programs to be deleted.

³⁹ There are, however, changes stemming from our resolution of the translator question (sec. 3 below).

if (1) that station's network programming is substantially duplicated by one or more stations of higher priority, and (2) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station. Moreover, in cases where (1) there are two or more signals of equal priority which substantially duplicate each other, and (2) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. Where a signal is required to be carried, it shall be carried without material degradation in quality, and shall be carried in full except to the extent that nonduplication of higher priority signals may be required under the rules. Upon request of the local station, the signal shall be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) and on no more than one channel. Where a system is not carrying the signal of a grade B or higher priority station, it shall offer and maintain for each subscriber a switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber indicates in writing that he does not desire this device.

67. *Modifications requested by the parties.*—Some of the parties have requested changes in these provisions. Thus, NCTA urges that CATV subscribers see no reason why out-of-State stations should be regarded as local. It asserts that CATV systems should have the option to carry more distant signals originating within the same State in preference to out-of-State stations placing a grade B signal over the community. We agree that there may well be instances where the programming of stations located within the State would be of greater interest than those of nearer, but out-of-State stations—e.g., coverage of political elections and other public affairs of statewide concern. We recognize also that there may be instances where out-of-State stations located in another State are of greater community interest than the geographically nearer out-of-State stations because of closer community ties with the third State. Considerations of this nature will be accorded substantial weight as a basis for waiver of the carriage provisions.

68. In this connection, we emphasize that we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the carriage provisions of the rules to systems now in operation.⁴⁰ Where, because of limited channel capacity, a CATV system cannot carry all grade B signals without dropping a more distant signal now being carried, we shall entertain a request for waiver of the rules pursuant to the summary procedures discussed in paragraph 97 below and upon the basis of the showing specified in paragraphs 104, 106. In appropriate circumstances, waiv-

⁴⁰ As in the case of our present policy with respect to microwave systems, carriage will not be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ers will be granted, which will permit the system to continue to carry the distant signal and to substitute the nearer signal only where simultaneous duplication would occur. Thus, upon such waivers the CATV viewers would continue to receive all programs to which they were accustomed, via the more distant signal when the programs are different and via the local signal when the programs are the same. New systems can commence operation with a channel capacity sufficient to carry both the local and the distant signals; indeed, most new systems now commence operation with 12-channel capacity.

69. Section 21.712(f)(2), section 74.1033(d)(2), and section 91.559(d)(2) presently provide that where a signal is required to be carried, it "shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation)." WJAC, Inc., and WKBH Television, Inc., urge that carriage on channel should be a matter for the station's choice. According to WJAC, the station should be entitled both to insist that its signal be carried on another channel, and to select the channel of a lower priority or non-local station. AMST claims, on the other hand, that carriage on channel is extremely important and should be mandatory unless the CATV makes a compelling showing that this is not technically feasible without degradation. It states that the CATV should be required to take all reasonable steps to eliminate material degradation which may result from the CATV equipment used or inadequate installation.

70. Since sections 21.712(f)(1), 74.1033(d)(1), and 91.559(d)(1) already provide that the "signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art)," we do not think that any change in subsection (2) is called for. The requirement for onchannel carriage is only operative upon request of the station licensee or permittee. If this results in material degradation, the station can request carriage on another channel. Moreover, if the channel capacity of the system is such that some signal must suffer material degradation, the inferior signal obviously should not be that of a higher priority station. First report and order in dockets Nos. 14895 and 15233, paragraph 135. However, no reason appears why it is necessary for the station itself to select the alternative channel. So long as the requirements of the rules are met, the CATV operator should be free to decide how the channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not have complete discretion under sections 21.712(d)(2), 74.1033(b)(2), and 91.559(b)(2) to select among substantially duplicating signals of equal grade where noncarriage of one or more is necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. It urges that the rule should be modified to set forth reasonable standards for selection, such as the respective distances of the stations from the community, relative signal strength, respective audiences in the community—as measured by audience surveys, terrain considerations, and the like. We recognized in the first report and order in Dockets Nos. 14895 and 15233, paragraph 91, that leaving the selection to the CATV's discretion makes possible "dis-

crimination between local signals in some instances." We further stated that we would closely examine complaints of abuse, particularly where the CATV operator has an ownership or other interest in one of the duplicating channels. We shall also give particular consideration to any allegation that the station not carried is one with closer community ties. The criteria suggested by AMST would not do away with the necessity for case-by-case resolution of complaints. AMST concedes (comments, p. 20) that any criteria for determining priority should not be inflexible and that an opportunity should still be provided for the submission of other data to the Commission. In the circumstances, it seems preferable to retain the rule in its present form until experience in its administration demonstrates what refinements might be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated stations in order to bring in distant independent stations which do not place a grade B signal over the community of the CATV, should not be permitted since "this would drastically affect the normal off-the-air competitive pattern of television service" (AMST comments, pp. 20-21). This provision is admittedly a "compromise approach," recognizing both that a CATV system owes its primary duty to the stations that are closest and place the best signal over its community, and also that carriage of nonnetwork signals may contribute to the diversity of its service (first report and order in dockets Nos. 14895 and 15233, par. 89). The general questions of whether there should be some limit on the distance and number of nonlocal signals brought in, as well as the matter of "leapfrogging," are being considered in part II of this proceeding. Pending resolution of these matters, we shall retain the rule in its present form.

73. Next, AMST asserts that the installation of a switching device should be mandatory in all cases, whether or not the local signal is carried, so that the subscriber will not be foreclosed from off-the-air service where the cable system is inoperative or not operating properly. It is further urged that no exception should be made when the subscriber indicates in writing that he does not desire a switch, since the requirement could easily be avoided by a "small-print" waiver in the subscription contract. While these suggestions may have some merit, we do not think they warrant a revision of the rules. The rules are designed to protect local stations in areas which are crucial and essential to preserve and encourage service to the public. For the reasons stated in paragraph 51 of the first report, particularly that going to "sheer inconvenience of switching * * *" we do not view this area as one of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear to warrant modification of the rules. Sections 21.712(d) (3), 74.1033 (b) (3), and 91.559(b) (3) now provide that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent, carriage of one will relieve the system of any obligation to carry the other. AMST points out that this would allow a CATV system in, or very near to, the same community as the satellite to carry only the parent station, causing the satellite to lose audience for which it may be originating some local programing

and reducing its incentive to originate programs. It urges that satellites should be treated like any other station in accordance with the prescribed priorities. Since satellites operate on assigned channels and possess the potential to develop into regular stations, there is a strong public interest in encouraging them to do so. Accordingly, sections 21.712 (d) (3) and (g) (3), 74.1033 (b) (3) and (e) (3), and 91.559 (b) (3) and (e) (3), together with the note to those sections, will be deleted.

75. And, finally,⁴¹ AMST suggests that CATVs be required to refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules. Such a requirement is implicit in the carriage provisions and we would so rule upon complaint. The addition of an explicit provision does not appear necessary in the absence of some evidence of abuse. In this connection, we note that it is asserted in the comments of NCTA that some broadcasters who have requested systems to refrain from advance duplication of delayed broadcasts have later presented only a portion of the program. Since the CATV system is relying exclusively upon the signal of the local station to bring the program to its subscribers, the station has an obligation to present in full any program for which nonduplication is requested. Again, upon complaint we would rule accordingly. See also paragraph 158, first report. Moreover, same-day nonduplication will greatly reduce the likelihood of any incidents of this nature.

76. Accordingly, apart from the provisions relating to satellites and the changes occasioned by our disposition of the translator questions (sec. 3 below), the carriage requirements of the new rules will be the same as the provisions now governing microwave-served systems.

3. Translators

77. Part I of the notice in this proceeding (par. 36) requested comments on two questions concerning translators: (1) Whether CATVs should be required to carry and not duplicate the signals of station-owned translators operating beyond the parent station's grade B contour,⁴² and (2) whether translators should themselves be precluded from duplicating the programs of local stations.

78. With respect to the first question, the parties have expressed diverse views. The CATV interests and some of the broadcasters argue against extending any protection to translators outside the grade B contour because such translators are operating outside the normal service area of the parent station, do not provide a local service or possess the potential for developing into regular local stations, and are relatively inexpensive to construct and operate. It is further asserted

⁴¹ AMST also asks that the definition of substantially duplicating network programming (secs. 21.710(f), 74.1001(e) (6) and 91.557(f)) be modified to apply only to a situation where two or more stations are primary affiliates of the same network. While such a definition might have been equally acceptable as an original matter, we do not think that any difference between the two is significant enough to warrant redoing the rules at this point. An additional proposal of AMST that the substantially duplicated concept be retained only for purposes of carriage has in effect been granted in view of the matters discussed in par. 58 above.

⁴² Under the rules adopted in dockets Nos. 14895 and 15233, station-owned translators located within the grade B contour are treated as extensions of the originating station (secs. 21.710(b), 74.1001(e) (2), and 91.557(b)). Such translators will be treated the same under the new rules.

that translators should not be protected because they may impede the establishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau urge, on the other hand, that all translators (including those not station owned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged because their service is received off the air free and covers a wider area than cable service. They would exempt translators from the carriage requirement where: (1) The CATV system is carrying the translator's parent station, (2) the CATV system is within the grade B contour of a station whose programming is substantially duplicated by the translator, or (3) the translator is supplying programming which substantially duplicates that of another translator whose originating station is closer. Nonduplication protection is not sought for the asserted reason that translators do not provide a local service or possess potential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons in rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals are received free and reach persons outside the urbanized areas served by CATVs, one of the major recommendations of the Seiden report was that increased consideration be given to the expanded use of translators. The report states (p. 22):

Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

The report also recommends increased use of translators to broaden the coverage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and order in docket No. 15858, issued on July 9, 1965, amending the rules to permit 100-w VHF translators on any channel listed in the Table of Assignments unoccupied by a regular television station or satellite. The rules were also amended to permit 100-w UHF translators on all unoccupied UHF channels in the Table of Assignments in lieu of the previous limitation to the upper 14 channels. In addition, we have recently proposed to permit the use of microwave frequencies to relay programs to translators (notice of proposed rulemaking in docket No. 16424, FCC 66-41).

82. In line with this policy, we think that CATV systems should, upon request, carry the signals of commercial and educational translators operating in the community of the system with 100-w or higher power, where the system has the channel capacity to do so. Since non-carriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central core of the community may well destroy the incentive to establish

translator service for nonsubscribers in the community and persons in the surrounding areas. Moreover, we think that same-day nonduplication should also be afforded to translators carried on the system. Translators operating with 100 w or higher power are properly distinguishable from other translators since they have greater potential for development into stations, and it is particularly important that such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three already listed in the carriage provisions of the rules. Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power. As requested in the comments, exceptions will be added to exempt CATVs from the translator carriage requirement where: (1) The CATV system is carrying the originating station, or (2) the CATV system is within the grade B contour of a station carried on the system whose programming is substantially duplicated by the translator. The provisions of the program exclusivity sections will also be appropriately amended to require same-day nonduplication upon request of a translator station carried on the system.

84. With respect to the second question, whether translators should be required to refrain from duplicating local stations, our present policies and rules are as follows: Pending the outcome of this proceeding, we have been following a policy of conditioning UHF and VHF translator grants with the requirement that the translator, upon request of any station within whose grade A contour the translator operates, refrain from duplicating the station's programs either simultaneously or within 15 days. (*Lee Co. TV Inc.*, FCC 65-483, 5 Pike & Fischer, R.R. 2d 257; *Report and Order in Docket No. 15858*, par. 12.) Under section 74.732(e) (1) of the rules, the only station-owned VHF translators authorized outside the grade B contour of the parent station are high-power (100-w) VHF translators operating on assignments in the Table of Assignments. Moreover, section 74.732(e) (2) of the rules provides that a station-owned VHF translator which is intended to provide reception within the grade A contour of another station will not be authorized if there is any duplication, unless the translator is intended to improve reception within the principal city contour of the parent station. However, we have waived the provisions of section 74.732(e) (1) and (2) where a nonduplication condition was imposed.

85. Our translator rules and policies are currently in a state of flux. Part II of this proceeding (notice, pars. 61, 64) proposes a reexamination of all of our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services. A number of measures were proposed in the comments in docket No. 14848, which were deemed beyond the scope of that proceeding but may be pertinent to this reexamination. It was suggested that the multiple ownership and duopoly rules be amended to allow potential 100-w translator operators to convert these to regular stations and to encourage television station licensees to apply for them. Other suggestions included proposals for increased power for existing translators on other channels; removing the restriction in section 74.732

(e) (1) on the use of VHF translators by television station licensees beyond their grade B contour; permitting translators to be used as relay stations (only) where the need exists; permitting multiple RF amplifiers for UHF as well as VHF translators; and permitting UHF stations to use VHF translators within their grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counterproposal in docket No. 14229, and will also be considered in our resolution of basic translator policies in part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to which the rebroadcast consent provisions of section 325(a) may in practice limit duplication by translators.⁴³ In addition, if translators were required by rule to refrain from duplication within the grade B contours of regular stations, a question would be presented as to whether the provisions of section 74.732(e) (1) and (2) continue to serve a useful purpose or should be amended. It would be contrary to the public interest to delay a resolution of other portions of part I of this proceeding pending a thorough reexamination of the translator rules and policies. Nor does it appear advisable to undertake a partial revision of the translator rules at this point merely in order to attempt to equalize the position of translators and CATVs. In the circumstances, we think it best to defer rulemaking action until more basic translator policies have been established.

86a. In the meantime, we will continue to grant waivers of section 74.732(e) (1) and (2) in appropriate instances, and will condition station-owned VHF translator grants with a requirement of same-day nonduplication within the grade A contour. In view of our policy of encouraging UHF, we will not impose any nonduplication condition on UHF translator grants for facilities to operate in an all-VHF area. Nor do we believe it appropriate to follow any general policy of requiring a nonduplication condition where the translator applicant is not a broadcast licensee, e.g., a community sponsored translator. It would appear unlikely that such a condition is needed in, or would serve, the public interest. The rebroadcast provisions of section 325(a) may work with greater efficacy in the case of translators not owned by broadcast licensees. Further, the amount of duplication in this type of situation is not likely to be of a substantial nature, since local residents are clearly not apt to undertake the expense and inconvenience of translator operations supported by local assessments or donations unless a substantially different program service is being made available. In these circumstances, we do not think it desirable as a general policy to place any significant barrier,

⁴³ Although the notice requested information on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators, no party except National Broadcasting Co. commented on this subject. NBC states that since 1960 it has followed a general policy of granting consent for rebroadcast of its programs provided that the translator is closer to its originating station than to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast consent where the translator operated in an area served by an NBC affiliate, but only for NBC programs which were not broadcast by the local station. See also par. 53 of the first report and order; *National Broadcasting Co.*, 20 Pike & Fischer, R.R. 1013; *Millers River Translators, Inc.*, FCC 63-504, 25 R.R. 516, 518, affirmed in *Springfield Television Broadcasting Corp. v. F.C.C.*, 328 F. 2d 186 (C.A.D.C.).

not urgently needed, to the development of such community type translators. We shall, of course, consider whether additional requirements are appropriate, either upon request or on our own evaluation of a particular situation, and will make all translator grants subject to the outcome of part II of this proceeding. We will also take into account, where warranted in individual situations, the possible discriminatory effect of our interim translator policy upon any existing CATV system competing with the translator.

4. Educational television stations

87. The rules adopted in dockets Nos. 14895 and 15233 require the carriage of noncommercial educational stations (ETV), but do not require CATVs to refrain from duplicating their programs. We followed this course because those proceedings were primarily concerned with commercial stations and many of the considerations discussed in the first report and order did not appear to be applicable to ETV. The notice herein recognized, however, that carriage alone might not be sufficient to promote the sound growth of local educational stations. Information was requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. It is further asserted that CATV competition has no economic impact on ETV because it operates on a nonprofit basis. National Educational Television (NET), the National Association of Educational Broadcasters (NAEB), and Eastern Educational Network (EEN) take a sharply different view in their more extensive comments. They claim that local educational stations, though different from commercial stations, have an even greater need for nonduplication and interim protection because CATV undermines the local financial support and other local interest which is vital to ETV operations. In this they are supported by American Broadcasting Co., AMST, and labor unions representing employees in the broadcast, CATV, and associated talent industries.

89. EEN and NAEB stress the importance of local financial support to educational stations. Although Federal grants-in-aid under Public Law 87-477 are available for the construction of educational facilities, the operations of such stations are almost entirely dependent upon local financial support. Operating income is derived primarily from (a) schools and universities, (b) local and State governments, and (c) contributions and "subscriptions" from the general public and donations by local industries and businesses. Members of the public and local businesses will have little or no incentive to support the local station if ETV is made available on the cable by CATV's importation of outside educational stations. As EEN puts it (comments, p. 12); "It is wholly unrealistic to expect that the public will be willing to pay twice for educational service—to subscribe to CATV and to 'subscribe' to local ETV." Diversion of funds provided by local and area educational institutions and local and State governments for inschool television would be even more serious, since these

sources generally provide over one-half of the financial support for local educational stations.⁴⁴ If a distant ETV signal is available on the cable, and can be fitted into local schedules of instruction, local schools and local and State governments would be much more unlikely to provide the financial support and other interest necessary to start a local educational broadcast service. This would be particularly the case where the CATV offers to wire the urban schools "free." Unlike the local educational station, the CATV is in a position to make such an offer because it does not pay for programs or maintain expensive facilities for local program origination and it can recoup the cost of free school service through subscription fees charged to the general public.

90. Should CATV activity within urbanized areas siphon off sufficient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The existence and viability of local educational broadcast outlets has special significance for ETV because the educational process is geared to local conditions and needs. Local ETV stations are more than mere facilities for delivering educational programs. They are an integral part of the educational and cultural life of a community and area. This is particularly true where ETV is used for inschool instruction. ETV must plan, prepare, and schedule educational programming on the basis of individual school and community needs, whether the basic program material is produced by the station itself or outside sources. The station also provides study guides for use by the teachers in the schools. CATV cannot effectively provide this carefully planned and prepared service by indiscriminately importing signals from distant educational stations located in cities with different needs and interests.

91. Moreover, local educational stations serve not only the schools and populations in the immediate community; they provide service to the surrounding rural area not reached by CATV. NAEB points out (comments, p. 2):

Indeed, it is the rural area with limited budgets, facilities, and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music, or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

In this connection we note also comments filed by the American Farm Bureau Federation, National Farmers Union, and National Grange stating that rural residents, who often are relatively remote from the entertainment attractions of the city, probably more than other groups of citizens in the country, rely especially on radio and television as a major source of entertainment and information.⁴⁵

92. Accordingly, the educational interests urge that ETV stations be granted nonduplication protection for a period either the same as

⁴⁴ "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

⁴⁵ Apart from ETV, it is stated that rural residents rely especially on local broadcasts giving agricultural information, weather conditions (flood, frost, etc.), pest hazards, and current market conditions.

or much longer than that accorded to commercial stations.⁴⁶ Moreover, both NAEB and EEN urge the adoption of procedures to protect communities with educational reservations which have not yet been activated. NAEB requests that the CATV be required to notify local and area school authorities and ETV interests of its proposal to bring in a distant ETV signal. In this way, NAEB states, local ETV interests would be alerted and could bring the matter to the Commission's attention for whatever action or conditions appeared warranted in the circumstances. EEN urges the adoption of interim procedures similar to those proposed for CATV operations in major markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are not answered by simply stating that the public interest is served by the widest dissemination of educational material. If CATV operations should prejudice the establishment of new ETV stations on the unused reserved assignments or prevent existing stations from realizing their full potential, the result would be a narrowing of the distribution of educational material—a loss hitting hardest persons residing in rural areas and those unable to afford CATV fees. As in the case of commercial stations, CATV's proper role is to supplement, rather than to supplant, local educational broadcast service. The national policy of encouraging the full development and expansion of ETV is reflected in the grants-in-aid legislation (Public Law 87-477) and has long been a matter of deep concern to the Commission (sixth report and order, pars. 33-49). It would be plainly inconsistent with that policy to accord educational stations less protection than commercial stations if there is any real likelihood of prejudice flowing from CATV importation of outside ETV signals. Considering the continuous financial struggle of ETV and its dependence upon local financial support and interest, we think that the possibility of adverse effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt same-day nonduplication for commercial stations and since it is asserted that effective nonduplication protection for ETV would require a much longer period, we do not think it appropriate to adopt 15-day before-and-after nonduplication for ETV, as requested by NAEB and ABC. There is no agreement among the educational interests as to what time period would be appropriate, and even an extensive nonduplication period would not solve the problem of achieving adequate operational funds for existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding paragraph, than by delayed nonduplication periods such as 15 days before and after. Therefore, while recognizing that some measure other than nonduplication may be more suitable for ETV, we shall amend the exclusivity provisions to include educational stations. The rules will thus apply equally to all stations in line with our conclusion (par. 54 above) that they should be the same for all systems. We will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, and

⁴⁶ The longer period is sought because of the block distribution process for the NET scheduled service and distribution patterns of regional educational networks like EEN.

would not hesitate to amend the rules should this subsequently prove necessary. ETV interests have indicated their intention to keep us apprised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV comments is the possibility that CATV, by bringing outside educational signals into communities where educational assignments have not yet been activated, will siphon off enough local support to preclude the establishment of an educational station. The policy of reserving channels for educational stations is in recognition of the fact that some time may elapse before such stations come into being. While the grants-in-aid legislation has speeded up the process in many areas,⁴⁷ the reservations still serve a needed purpose which should not be undercut. CATV provides a valuable service to schools and other subscribers by bringing in ETV which is not yet locally available. But this should not be at the expense of preventing a local service from ever being established. Accordingly, we shall adopt the suggestion of NAEB that local and area ETV interests and school authorities receive advance notice of CATV proposals to bring in outside ETV signals. The attached rules (app. D) require the CATV system to give notice of its proposal to bring in a distant ETV signal, at least 30 days prior to commencing service, to the local superintendents of schools and to the area and State educational television agencies (if any). This will enable ETV interests in the area to make objection to the CATV system where a local station is contemplated. Where a local ETV station is reasonably imminent and objection is made to the Commission, we would not ordinarily approve importation of the distant ETV signal unless it has been established after appropriate proceedings that this would not prejudice the establishment or maintenance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an educational signal is carried on a CATV on a channel partially used for commercial signals, the placement of commercial announcements adjacent to educational material carried on CATV jeopardizes the public image of ETV and prejudices its position with program suppliers and copyright owners who insist upon noncommercial presentation. However, we do not think that a sufficient basis has been shown for the relief requested, i.e., prohibiting commercial announcements adjacent to educational programming or requiring CATVs to devote channels exclusively to educational programming. We cannot undertake to preserve ETV or commercial stations harmless from all conceivable prejudice no matter how slight. Moreover, we are reluctant to interfere with CATV operations any more than necessary in the public interest or to impose requirements not shown to be essential. CATV systems with limited channel capacity and those carrying a large number of commercial signals might find it difficult to devote channels exclusively to ETV. CATVs may also wish to use educational signals to fill in portions of commercial signals which cannot be carried because of the nonduplication requirements. Moreover,

⁴⁷ The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from 5 at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF educational stations went on the air.

since educational stations normally do not have as long a broadcast day as commercial stations, the CATV system may wish to provide its subscribers with other material during the time that the educational station is not broadcasting. In view of the station identification announcements made during the course of the educational programming, it seems to us that the prejudice to the originating ETV station, if any, would be minimal.

D. Procedural Matters

1. Ad hoc procedures

97. It has been suggested in the comments that the Commission should adopt specific rules providing for summary, nonhearing procedures to handle requests for waiver of the CATV rules or for different treatment or affirmative relief. We think the suggestion has merit. The general provision for waiver of any rule (sec. 1.3 of the rules) does not afford an adequate procedure for seeking additional affirmative relief or different treatment. Moreover, such procedures would be useful to handle requests for rulings on complaints or disputes. We recognize that to hold hearings upon each such request relating to carriage, nonduplication, and ETV, would be time consuming and burdensome to the CATV systems and stations involved, particularly those in smaller communities. In addition, while such procedures will not apply to the matter of distant signals in the top 100 markets, for which a showing made in evidentiary hearing is required (see par. 141 below), they could be utilized in many instances to resolve distant-signal questions in the smaller markets.

98. Accordingly, we have undertaken in section 74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of such requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings.⁴⁸ In the event that the petition involves new service to CATV subscribers, the Commission will expeditiously rule on the matter, either in whole or to the extent of determining whether there

⁴⁸ Since petitions under the ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under sec. 74.1109, as well as to proceedings under sec. 74.1107. The principles discussed in par. 9 of the report and order in docket No. 15381, FCC 65-598, 1 F.C.C. 2d 49, will also apply.

should be a stay or other temporary relief pending such additional procedures as may be required (see par. 100 below).

2. Information to be filed with the Commission by existing CATV systems; notification by new CATV operations

99. Pursuant to our authority under section 403 of the Communications Act, all existing CATV operators will be required to submit to the Commission, within 30 days after the effective date of our order herein, the following information with respect to each of their CATV systems: (a) The names, addresses, and business interests of all officers, directors, and persons having substantial legal or beneficial ownership interests in each system;⁴⁹ (b) the number of subscribers to each system both currently and as of February 15, 1966; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system. Any CATV system which is located within the predicted grade A contour of a television station in the top 100 television markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) and which carries the signal of a distant station(s) will also be required to submit a map showing the location of its cable lines being used to serve subscribers on February 15, 1966.⁵⁰ It is not practicable to apply the notification provisions set forth below to the present operations of existing systems, and there is no comprehensive or accurate listing of CATV systems available to apprise television station licensees or permittees of all existing CATV operations within their grade B contours. Indeed, we have noted that while the recent growth of CATV is of an impressive nature, there are conflicting estimates as to the precise dimensions of that very substantial growth. The information obtained will assist the Congress in its consideration of the Commission's legislative proposals in the CATV field, and the Commission in its consideration of matters in part II of the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or permittee of any television broadcast station within whose predicted grade B contour the system will operate and the licensee or permittee of any 100 w or higher power translator located in the community of the system, with a copy to the Commission, concerning the proposed operation within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities. In no event may new service be commenced until 30 days after notice has been given. The notice shall include the name and address of the system, identification of the community to be served, the television stations to be distributed, and the estimated time for the commencement of operations. Similar notification will be required by existing systems which propose to add new distant signals (at least 30 days prior to commencing service) or to extend lines into obviously new geographic areas (within 60 days after obtaining a franchise or entering into a lease or other arrange-

⁴⁹ In stating the ownership interests in a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

⁵⁰ Existing systems in the markets below 100 may subsequently be required to submit a map showing the location of lines as of a specific date in connection with any petition for ad hoc consideration of a geographic extension into new areas.

ment to use facilities or at least 30 days prior to commencing service where no new local authorization or contractual arrangement is required). In addition, as already indicated, notice to local and area educational authorities and ETV interests will be required at least 30 days prior to commencing service where carriage of a distant ETV signal is proposed. Such notification will afford the local television stations and other interested persons an opportunity to request carriage and nonduplication under the rules or to petition the Commission for different requirements before service is commenced and thus avoid disruption to the public. Where a petition for ad hoc consideration is filed with the Commission by any station, CATV system, or other interested person within 30 days after notice, new systems and existing systems proposing to add new distant signals shall not commence new service until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.⁵¹ In the event that an evidentiary hearing is required, the question of whether there should be a stay or other temporary relief pending the hearing will be expeditiously resolved prior to the hearing on the basis of the pleadings of the parties and such additional written submissions as the Commission may request.

3. Form and enforcement of the new rules

101. Aside from the obvious distinction that nonmicrowave CATVs do not file applications for licenses with the Commission or use licensed facilities, no special problems of substance or procedure in making the carriage and nonduplication requirements applicable to them have been called to our attention and none is apparent to us. While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the nonmicrowave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312 (b) and (c), or pursuant to section 502, of the act and will not include other sanctions applicable to licensees. And, third, some change is required in the provisions requiring notification to all licensees or permittees of television stations placing a grade B or better signal over the community of the CATV system that a microwave application has been filed or a request has been made of a common carrier for microwave service. (See sec. 2 above.)

4. Retention of the microwave rules

102. It is urged by American Telephone & Telegraph Co. and by U.S. Independent Telephone Association (both in comments in docket No. 15971 and in its petition for reconsideration of dockets Nos 14895 and 15233) that the rules governing microwave grants should be deleted when the obligations are imposed on CATV systems directly. We think it best to retain the rules conditioning microwave grants (as revised herein) in their present form for a while longer, until CATVs

⁵¹ The matter of extension of lines into new geographical areas by existing systems in top 100 markets is discussed in par. 149 below. As already indicated, the ad hoc procedures do not apply to new service involving distant signals in the top 100 markets or obviate the need for evidentiary hearing as set forth in pars. 141-143 below.

generally are operating in accordance with the new rules. Pending such compliance, we cannot make the requisite public interest finding for the issuance of the microwave licensee in the absence of a showing that the facilities will be used in accordance with the conditions. Moreover, the requests of A.T. & T. and USITA are primarily grounded in the alleged burden to the common carriers, which will be substantially alleviated in this interim period by the revisions made in the memorandum opinion and order on reconsideration in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. However, once widespread CATV compliance with the new rules has been achieved, some modification of the microwave rules would clearly appear to be appropriate and we shall take action toward this end as soon as it is possible to do so.

5. Transition period

103. In the first report and order (par. 161) and in the notice (par. 34), we stated that we would consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and non-microwave systems with limited channel capacity. To obtain relevant information, the Commission mailed a questionnaire to every known CATV operator. The questions were designed to elicit specific information with respect to the effective channel capacity of each system, the local television signals which might fall within the carriage provisions of the rules, and the number of channels in use for nonlocal television signals or other purposes. Responses were received from 1031 CATVs, of which 250 were microwave-served and 781 were nonmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 percent of the microwave systems were not in compliance with the carriage provisions, and half of these either had the unused channel capacity to come into compliance, or, in view of plans to expand the system, would shortly be able to comply. Less than 10 percent of the microwave systems could not comply with the rules without having to drop one or more signals currently carried. Accordingly, the Commission, on December 8, 1965, determined that there was no need to afford microwave-served systems a general delay in the application of the rules relating to carriage, and notified all common carrier and Business Radio Service licensees serving CATVs that the rules would be effective on and after February 1, 1966, to renewal applications. We further advised such licensees that the renewal application should contain a request for waiver of the rules relating to carriage, if a waiver were desired, together with the following showing:

The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programming is duplicated by a more distant signal. See *Black Hills Video Corp.*, 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responded to the questionnaire, it appears that 605 are already in compliance with the carriage requirements of the rules. An additional 87 systems have sufficient unused channel capacity, or are expanding their capacity, and would be able to comply without having to drop any presently carried television signal. Two systems might have to utilize a channel presently carrying FM radio and CATV originated programming, and 10 systems furnished insufficient information for any conclusion as to their situation. There remain 77 systems which would have to drop one or more television signals presently carried in order to add one or more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that only a comparatively small percentage of the nonmicrowave systems could not comply with the carriage provisions without substituting a local for a more distant signal. In the circumstances, we believe that there is no need to provide for a general transition period by rule. The problems of individual systems will be considered on a case-by-case basis, upon a request for waiver making the same showing applicable to microwave systems. Accordingly, the rules will apply immediately to all new CATV systems commencing operations on or after their effective date, and will apply 60 days thereafter to existing systems unless a request for waiver has been filed with the Commission. Our aim is to allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted (as against the *Black Hills* type of protection (6 R.R. 2d 199, at 201 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respect to carriage does not take account of 100-w translators operating in the community of the CATV. Our decision (pars. 82, 83 above) to accord high-power translators fourth priority may raise some additional channel capacity problems. While this new provision will have the same effective date, waivers may be sought by microwave and non-microwave systems either within the 60-day period or upon receipt of any request for translator carriage which gives rise to some problem.

6. Copyright suits

108. Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot

bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). See *Report on Rebroadcasting Rules*, 1 (pt. 3) Pike & Fischer, R.R. 91: 1133, 1134, 1137, where we stated in connection with rebroadcast rights under section 325(a), that the section "may no longer accurately reflect present conditions" since most programs were not owned by the originating station who could not therefore legally grant the rebroadcast permission sought. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules.^{51a} We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.

CONCLUSION AS TO PART I

109. The foregoing are the rules which we believe to be appropriate for all CATV systems at this time. We believe that they represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio" (sec. 303(g)). We recognize further revision may be called for as we gain experience in their implementation. This docket (15971) remains open with this report designated as the second report, and we shall revise the rules, as the public interest requires, in our consideration of part II or upon the basis of new information or experience (and, if appropriate, after giving notice of such proposed revisions). Finally, as in the case of all rules, we shall give further guidance through the medium of rulings directed to specific situations.

110. In light of the foregoing, we find that the public interest would be served by modification of the rules previously promulgated for microwave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached appendix D. Authority for the rules adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Communications Act of 1934, as amended.

PART II. MAJOR MARKET, DISTANT STATIONS POLICY—PARAGRAPH 49-50 OF THE NOTICE

A. The Notice; Comments

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

*** pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a

^{51a} And, of course, stations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules.

CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

In paragraph 50, we specifically invited comment:

* * * on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49)), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community.

112. We have considered the comments received on this important aspect. A summary of some of the comments is set out in appendix B.

B. Evaluation

113. The discussion in appendix B gives some of the highlights of the comments submitted on this aspect. The more detailed showings have, however, been considered, and will be referred to in the ensuing discussion. While these showings are pertinent, particularly with respect to the trends which are so important to our evaluation, they do not supply definitive answers to the problems before us; rather, they serve to point up the problems and, in the circumstances, to the procedures called for. We shall develop the underlying considerations at some length, and even with some repetition of the discussion in part I, because of the great importance of the matter. There are two central grounds for our action—(1) an economic impact ground, based on the trends in the CATV and UHF fields, and (2) a fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.

1. The economic impact ground

114. *The UHF trend.*—As stated in our notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this "unique" legislation in 1962, Congress made the judgment that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population" (H. Rept. at p. 3). Such a fourth station might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programming and self-expression"—an important need in many markets "because all of the available stations are network affiliates" (H.

Rept. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9 million a year, Congress and the American public have staked a great deal on the development of UHF.

115. As we pointed out in the notice and our prior discussion, there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities. Thus, from the beginning of 1962 to the end of 1965, the number of UHF commercial stations on the air increased from 85 to 100, and most significant as an indication of the trend, the number of applications pending (with multiple applications for the same channel counted once) increased from 19 to 80. There are now indications of the beginning of a fourth network or of an "FM-type" network, involving UHF and VHF stations in some major markets. With this increased ferment in UHF, we believe that the next few years will supply the critical answer to whether the congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved. (See H. Rept. at p. 7; S. Rept. at p. 6.)

116. *The CATV trend.*—The CATV trend is even more pronounced, and has already been noted in our first report, paragraph 65, 38 F.C.C. at page 709, and in the prior discussion (pars. 31-33). As stated, the CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (*ibid.*). The number of applications for franchises is even larger—an estimated 1,958.⁵² Clearly, there is considerable substance to the statement of the official of one of the largest CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 468):

The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day * * *.

117. Equally important is the changing nature of the CATV operation. In 1959, the average CATV provided three signals to its subscribers; in 1965 the majority provided five or more signals (par. 65, first report), and the average system built today has 12-channel capacity.⁵³ There are now 20-channel systems proposed (e.g., the Jerrold proposal in Philadelphia), with industry leaders predicting

⁵² As noted, the estimates as to franchises granted and applications vary. See pars. 31, 116, *supra*. NCTA reported recently that 1,500 applications for CATV permits had been filed in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By any estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large.

⁵³ In its reply comments (p. 18), AMST asserts that of 54 systems for which data was available and which began operations in 1965 (through July of 1965), only 5 were 5-channel systems; 44, or 81.5 percent were of 12-channel capacity.

that in the next 5 years "improved technology will have made the 20-channel CATVs commonplace * * *" (Television Magazine, Dec. 1965, p. 31). There is greatly increased use of microwave facilities (i.e., from 50 systems using microwave in 1959 to 250 in early 1965 to about 450 today). The distance which signals are taken has also increased greatly (to over 665 miles). Finally, the CATV industry has shifted its attention to the larger communities, and CATV franchises have been granted or are being sought in such cities as Philadelphia, Toledo, Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sacramento, Pittsburgh, Birmingham and Fort Wayne. To quote again the large CATV group (par. 39 of the notice):

First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.

But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. * * *.

The CATV applicant believes that it can be successful in such cities because it will bring better reception (particularly as to color) and, most important, the programming of important independents (e.g., the three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) raise a serious question. Both CATV and UHF broadcasting, for example, are entering the larger markets, most often in an effort to bring programming that is not now available in these markets. There are at least 163 communities or areas with UHF stations operating, authorized, or applied for which also have CATV activity. In 68 such communities or areas, there are already operating CATV systems; 29 have CATV systems franchised but not operating, and 66 have CATV applications pending. In the notice, we set out as an example the Philadelphia area, where there are now three commercial UHF stations on the air (and another one authorized) and there are several well-financed CATV applicants seeking to bring in the signals of the three New York independents. The most critical question posed is how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. While they give some indications (see par. 122, *infra*), the answer remains uncertain. On the one hand, the NCTA, relying largely on the Seiden report, contends that CATV in a large community such as Philadelphia can have little effect on the healthy existence of UHF stations; that if anything, CATV will aid these stations by bringing them into homes where they might not otherwise be received. But we believe that this contention has significant defects.⁵⁴ In any event, it would appear

⁵⁴ The Seiden report assumed "an optimum" of 50 percent penetration of the Philadelphia market by the CATV (but see para. 122-123 as to the "optimum" CATV penetration), and then, based on the fact that the three New York independent stations account for 9 percent of the TV homes during prime time, arrived at the conclusion that there would be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes out of 1.3 million TV homes in Metropolitan Philadelphia (report, pp. 84-86). As already noted (n. 19, notice) the report measures the diversion as against the total Philadelphia

that a crucial consideration is whether the Seiden report is correct in its belief that in the large cities, it "is not clear as to what these CATV promoters will offer that makes them think that they gain substantial numbers of subscribers in such areas" (Seiden report, p. 84). In his judgment, "potential CATV markets are those areas lying 40 or more miles distance from three full network signals * * *" (id. at p. 83).

120. But very important segments of the CATV industry do not agree with the Seiden report. They are proposing to invest very large sums of money (including amounts such as \$40 million) in their belief that CATV, employing 12, 20, or even greater capacity systems, can gain very substantial audiences in these large markets. The leaders of such important CATV groups as Jerrold or Teleprompter believe that "almost all American cities—small and large—will be wired for television * * *" and, in the words of the top official of Teleprompter, "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable rather than over the air" (Television Magazine, Dec. 1965, p. 30). Another experienced CATV operator estimated more conservatively that CATV may reach 30 to 35 million households within the next decade (Broadcasting Magazine, July 26, 1965, p. 31).

121. We do not accept the above statements as necessarily correct, any more than we accept Dr. Seiden's assertion to the contrary. The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets.⁵⁵

122. Indications in the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large

audience, plainly ignoring the very facts upon which the analysis is based. The point is that whatever criterion is used to measure CATV impact, the same criterion should be used to measure the audience UHF would have without CATV. If, therefore, it is assumed that 9 percent of the CATV subscriber homes would, on the average, be watching the three New York independent stations and would therefore be diverted from the three Philadelphia UHF stations, the resultant figure—61,450 homes—should be related not to the 1.3 million TV homes in Metropolitan Philadelphia, but rather to the average number of homes in Metropolitan Philadelphia that would be viewing the three UHF stations if there were no CATV. The audience for nonnetwork programming in Philadelphia is certainly no greater than in New York (and indeed would undoubtedly be much smaller in the beginning). If, therefore, 9 percent of the TV homes during prime time were assumed to be the number which, on the average, would be watching the three Philadelphia UHF stations, this would result in a total average audience of less than 120,000 homes against which the impact of a loss of more than 60,000 homes should be measured rather than against 1.3 million TV homes. In short, the Philadelphia audience which would be attracted to the New York independent stations is a very important part of the audience at which any independent Philadelphia UHF station must aim—a critical point ignored by the Seiden report.

We would also point out several other factors: (i) The potential effect on the UHF independent becomes even more serious when markets smaller than Philadelphia are considered (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such markets will have the financial base to bid for and obtain the same amount of expensive nonnetwork film program as the New York VHF independents, with their much larger population base, and thus, the CATV audience for nonnetwork programming may well not be divided equally between the UHF independents and the distant VHF ones; and (iii) the 20-channel system would permit the importation of the New York network stations which would also contribute to diversion of audience during the 30-45 percent of time these stations are presenting nonnetwork fare.

⁵⁵ As stated, the CBS study indicated that it had not included " * * * a group of applications for CATV systems in communities with three more than adequate services [e.g., * * * applications for franchises * * * in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland * * *]. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory." (CBS comments, exhibit A, pp. 16-17.) Thus, CBS focus was on the old or "traditional" CATV and not the new developing trend in the industry.

markets. Thus, Midwest Television, the licensee of a San Diego station, submitted a study made by an independent research organization in late June 1965, of the San Diego area, the 51st market (ARB ranking on net weekly circulation), with three VHF stations and CATV systems which carry these stations and all seven Los Angeles VHF stations without nonduplication treatment. The study indicated that the CATV systems, with a present total of roughly 10,000, are adding subscribers at a rapid rate. Thus, in one section where CATV had been available for only 3 months, more than 36 percent of the homes had already been wired for CATV; as of late June, 43 percent of the CATV subscribers interviewed had been subscribers for less than 3 months (Midwest comments, dockets Nos. 15971, 14895, and 15233, pp. 24, 28). But this study is obviously too fragmentary to be conclusive on this important question. The study also indicates very considerable impact upon the local stations. See paragraphs 40-41, *supra*.⁵⁶

123. There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10-percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the nonnetwork programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programming. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programming. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly the limited audience interested in viewing nonnetwork programming in the prime listening hours. See note 54, analyzing the Philadelphia situation on the basis of a 50-percent CATV penetration.⁵⁷ As pointed out, the

⁵⁶ To the same effect, see the address of Mr. George Blechta of Nielsen at the July 1965 NCTA convention, where Mr. Blechta referred to an eastern television market "where the sample indicated that one-third of the viewers are CATV subscribers and that the local stations have a combined share of audience of 85 percent among non-CATV homes in contrast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, July 26, 1965, p. 14.)

⁵⁷ Further, Philadelphia is the fourth largest market in the country. But in smaller, even though still major, markets, similar analyses raise even more serious questions. Thus, in the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV homes in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the average are watching television in prime time; without CATV, the UHF would do well to get a prime-time audience of 15,000 homes. While this audience, on the basis of our experience, would normally appear sufficient to support operation, obviously, significant diversion of the audience by CATV could be a serious matter. Yet CATV systems could bring in the VHF independents from San Francisco and, as we understand, from Los Angeles also. This example, dealing with a major market, could be multiplied many times.

nonduplication provision would afford virtually no relief, since non-network programming is not distributed on anything like a simultaneous nationwide basis.⁵⁸ The rise in advertising demand for television time is also pertinent to this question; as noted (footnote 30), there are countervailing considerations which, at the least, require that this fact be considered in the context of the particular situation (e.g., in Philadelphia there are three and possibly four new stations to share the increased advertiser demand). Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50- to 85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

124. It has been urged that we simply ignore the problem and let events in the major markets decide between CATV and the UHF broadcast stations. But for reasons already developed, such a course would be inconsistent with our statutory responsibilities and might lead to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently inconsistent with the public interest and the act's goals.

(ii) CATV is a form of pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.⁵⁹ If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programming and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

⁵⁸ Nor would extension of the UHF station's signal beyond its grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city independents (since such stations constitute a better sales point in obtaining subscribers) rather than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected in the event of very substantial CATV penetration.

⁵⁹ Thus, even the CATV industry estimates that on an industrywide basis CATV systems now in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent. (Television Magazine, Dec. 1965, p. 30).

125. If the New York independents sought translators to place their signals over the Philadelphia area, it could not seriously be argued that we should grant such applications on the ground that while they may be destructive of congressionally established goals, events in the market place should be allowed to give the answer. The matter is not really different here. The Commission has jurisdiction to "establish areas or zones to be served by any station" (303(h)), to make a "fair and equitable distribution of facilities among the several States and communities (sec. 307(b)), and "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions" (4(i)). If then we sit back, even though we have the jurisdiction, the authority, and the responsibility to carry out the congressional policies, and do not thoroughly explore the serious question posed, we would be simply abdicating our responsibility "to promote the larger and more effective use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programming in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on nonnetwork fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on entry of new UHF stations (or on the substantial expenditures which must be made for the high tower and power necessary for an effective operation). Permittees of several new stations have set out their fears of the consequence of CATV importation of distant stations from New York, Los Angeles, etc. To give but two examples:

(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the importation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) [Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS-TV to obtain the network affiliation required for its survival. (Statement of Rust Craft Broadcasting Co., permittee of UHF station WJKS-TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.⁶⁰ We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

128. The contentions of some of the parties with respect to pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse, AMST) have stated that CATV, particularly if it succeeds in the major cities, can readily branch out into pay-TV (for example, by providing that one channel will be "original" programming available only for a specific additional charge—a form of pay-TV somewhat akin to the Bartlesville experiment in 1957-58). The parties assert that whether or not pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the sale of the broadcast industry's product.

129. Whether a form of pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire-pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire-pay-TV proposals such as recently attempted in California. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the pay-TV "frosting"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. We have petitions now under consideration, which seek the authorization of pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this is added reason for the policy and procedure we have adopted, since that procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay-TV in that market. This is a matter which is also involved in part II of

⁶⁰ We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

this proceeding, and will be the subject of a specific legislative recommendation of the Commission. See paragraph 153, *infra*.

130. We believe that the foregoing discussion, showing the serious question posed by the potential effect of very substantial CATV development upon UHF development and the possible adverse consequences to the public interest, demonstrates the need for the major market, distant signals policy which we have adopted. Before discussing that policy (see pt. 3, *infra*), we shall turn to a second ground which also, in our judgment, supports the need for the policy.

2. Fair competition

131. We have previously discussed this "fair competition" ground in connection with the nonduplication requirement. See first report, paragraphs 52-57, 28 F.C.C. 683, 703-706. That discussion, which will not be fully repeated, is pertinent here. As shown, the CATV industry is growing at a tremendous pace, with a changing nature (entry into major markets, with 12- or 20-channel systems, bringing the signals of big city independents such as those of New York and Los Angeles). If the CATV should achieve substantial penetration of these communities (50 percent or over), the result might be most serious for the new UHF independents in these same areas. This points up a critical consideration—that the nonduplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of *independent* stations, and nonnetwork syndicated or film programing is not distributed on a simultaneous nationwide basis. We therefore shall reexamine the fair competition considerations in the context of the present problem—the CATV and UHF trends and the need to develop a policy or procedure because of these trends.

132. A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process, and this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently stands outside of the above program distribution process (pars. 54-55, first report, 38 F.C.C. at p. 704):

[The CATV] has not been found subject to the requirements of section 325. [footnote omitted] It does not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal

is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

134. The anomalies which result from this situation are even more marked in the case of the independent station, particularly in light of the recent CATV trend. Procuring attractive programming which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive feature film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive right for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

135. When the situation is viewed on an overall basis, rather than from the viewpoint of individual programs, the result is equally anomalous. The CATV seeks to secure as great a number of subscribers as possible in these major markets, aiming for a figure well over 50 percent if possible. Since the people in these markets have three full network services, it seeks to attract such a large number of subscribers, in large part, by bringing in the independent programming of distant big city stations such as the New York or Los Angeles independents. And it obtains such programming by simply paying a common carrier to bring to it the signals of these distant stations (or by itself erecting a tall antenna on an appropriate high elevation to receive the signals and then relay them with suitable amplification along the way to the subscriber). The new UHF station also seeks to attract as wide an audience as possible in these same markets by bringing in attractive nonnetwork programming. But the UHF station cannot, either by means of a common carrier, its own microwave relay, or a tall antenna, decide that the best way to obtain such programming is simply to bring in, in whole or in part, the programming of the New York independents. The established distribution process given congressional recognition in section 325(a), proscribes such conduct. (See letter to Mr. Martin E. Firestone, dated Dec. 16, 1965, FCC 65-1107.)⁶¹ Both the

⁶¹ As another example, in 1965, station KWOA desired to rebroadcast the signal of station WCCO, to present the play-by-play broadcasts of the Minnesota Twins' baseball games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the area in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.

broadcaster and the CATV thus have the same objective—providing as large a segment of the public as possible in these major markets with access to nonnetwork programs. The question therefore arises why the CATV should operate under one set of competitive rules and the broadcaster under an entirely different set. On its face, this competitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomalous situation and are particularly pertinent in view of the importance of sports programming, both to the CATV and broadcasting. The broadcast station (or its network) bids for the right to exhibit sports programming (see, e.g., \$37.6 million bid for CBS for the 2-year right to show NFL football games; *Broadcasting Magazine*, Jan. 3, 1965, p. 124); even then, those rights are at times circumscribed by blackout requirements (during home games), and other conditions permitted by Congress or the antitrust laws. See, e.g., Public Law 87-331. The broadcaster must operate in accordance with these established industry conditions. But the same sports program that is unavailable to the broadcast station is presently made available to the station's audience by CATV systems. In the words of the president and general manager of Wisconsin Valley Television Corp. (AMST comments, attachment B, p. 10, quoting the House CATV hearings on H.R. 7715, p. 415):

Another serious problem: In Wausau, Wis., because of our proximity to Green Bay, WSAU-TV is blacked out of the Green Bay Packers football games. This I can understand on behalf of the National Football League and the Green Bay Packers * * *. I'm not allowed to carry the games. Any cable system can reach to any area and get these games—some via microwave. Then these games can be moved into WSAU-TV's area. Can our station sit on a Sunday without the football game, while the cable system is running big ads in the local newspaper: "Get total television on cable television."

Now I would like to deliver total television but because of laws and rules and regulations, I'm not able to give total television. The cable system, with no laws, no rules, no regulations, can deliver to my audience, by FCC definition of tower height and power, much more television than I can deliver to them because of the stricture that I must operate under * * *."

137. The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals. In any event, the question remains: If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programming car-

ried over the New York independents. See section 325(a), and its legislative history. The result of such "freedom of access" would be gross inequity and chaos.⁶²

138. Here again we have reached no final determination but rather have concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.

3. The major market, distant signal policy, and procedure

139. We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest "in the larger and more effective use of radio." And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programing not otherwise available or, what is more likely, bringing in programing locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

140. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of con-

⁶² The answer that the CATV does not have a "free ride" in view of the cost of the cable system, misses the point, since the cost of the disseminating system is no basis for exemption from observance of the fundamental distribution process by which the program product is obtained. Both the CATV and the UHF station have substantial costs of construction maintenance and operation. Thus, the most recent UHF station in Chicago, Ill., had a construction cost of about \$3,000,000, with substantial estimated yearly operating expenses, including those sums allocated to programing costs. The UHF station cannot appropriate the programing of the New York independents, without consent or payment, no matter what its costs are.

gressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

141. We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its grade B into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the marketing studies which have been made relating to it (by either the CATV or broadcast groups in the area), the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans or potential of the proposed CATV operation for pay-TV, and other important facets. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of a particular case.

142. We believe that the procedure which we have adopted is fair and best suited to promote the public interest, taking into account both the development of the broadcast and the CATV industries. It is in line with the urging of several parties that what is needed is full evidentiary hearing. While the hearing urged has usually been one of an overall nature, we believe it best to consider these important matters in the context of the particular request and the particular situation.

143. We recognize that the evidentiary hearing may consume some significant period of time. But as stated, the public interest requires thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed. Further, the requirement for an evidentiary hearing has been confined to the top 100 markets, where there is generally no dearth of service and new UHF services are coming on the air. For example, in Philadelphia, there are three VHF network affiliated stations, three UHF inde-

pendents on the air, with a fourth authorized. In the markets below 100, where there may be a greater present need for additional television service, the general *requirement* for evidentiary hearing is inapplicable. See paragraph 146, *infra*.

144. We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute.⁶³ Further, as noted, any delay in commencement of CATV operation because of the necessity for evidentiary hearings is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service. Finally, the top 100 markets include roughly 90 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.

145. Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the non-duplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing.

146. We think, therefore, that a fair compromise is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take such action as may be

⁶³ Some question may arise as to whether a particular system is located in a market coming within the top 100. For clarification, we have specified that the above provisions are applicable to a CATV located in a community coming within the predicted grade A contour of any station in one of the top 100 markets. We have employed the grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. Where a CATV system is located within the top 100 markets when a hearing is commenced, the hearing will be continued even if these markets change in a subsequent ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listing of the top 100 markets except as to relative standing within the 100.

necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention. See paragraph 98. We shall not necessarily hold evidentiary hearing in connection with such petitions in the smaller markets. Such hearings could be a considerable burden both upon the CATV operation and the broadcaster in these small communities. See paragraph 78, first report, 38 F.C.C. at page 714. Indeed, the hearing might thwart the initiation of needed service. Therefore, while hearings might be held in some instances, we have devised flexible procedures generally to treat expeditiously petitions or requests involving the markets below 100, since we recognize that to hold hearings upon each such petition or request might be burdensome to all parties involved and to the public.⁴⁴

147. *The question of grandfathering.*—On February 15, 1966, we issued a public notice giving the essence of our determination in this respect. Systems not yet in operation on February 15, 1966, and proposing to extend the service of a station beyond its grade B contour into one of the top 100 markets will come within the scope of our major market procedure, and must make the necessary showing in an evidentiary hearing. In view of the very great desirability of avoiding the disruption stemming from action applicable to an operating system and the strong public interest considerations underlying our policy, we think good cause exists for immediate effectiveness of the major market rules upon their publication, as suggested by some of the parties. A line must be drawn as to “grandfathering,” and we believe it appropriate to do so upon the basis of operation on the date of the public notice. A system which has gone into operation by extending signals beyond their grade B contour to subscribers in the top 100 markets for the first time after that date, would be subject of a cease-and-desist proceeding.⁴⁵ Since we shall not “grandfather” systems coming into operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the Federal Register to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in the interval, a system might commence operation after the February 15 date and make “drops” to a significant number of subscribers, all of whose CATV service could be ended when the Commission instituted cease-and-desist proceedings as to the CATV operation. In the circumstances here, where “grandfathering” is pegged to the February 15 date, we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action,

⁴⁴ As previously stated (n. 51, first report, 3 F.C.C. at p. 715), we will, as required by the Communications Act and consistently with its procedural specifications (e.g., sec. 309), examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

⁴⁵ We recognize that this may catch some systems just prior to the commencement of operation. But this will always be true in the case of any policy in this area, and in any event, if the policy is to be effective and achieve the above described goals, it must be implemented immediately. We also point out that parties have known of the Commission's proposals for a major market procedure since Apr. 23, 1965 (and of the counterproposals since July 26, 1965). The notice expressly “* * * put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not” (notice, par. 65, 1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.

rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Good cause therefore exists to make the rules as to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.⁶⁶

148. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.⁶⁷ Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall “grandfather” all systems which were in operation upon February 15, 1966 (the release date of the above mentioned public notice), to the extent that such systems need not make the showing in section 74.1107 to continue to carry to subscribers signals beyond their grade B contour, which were being supplied to those subscribers on that date. But any addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

149. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).⁶⁸ While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the

⁶⁶ Similar good-cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

⁶⁷ As to the application of our carriage and nonduplication rules, see pars. 49, 68, 106.
⁶⁸ And certainly where a new franchise or amendment of an existing franchise after Feb. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and responses in the particular case, whether such temporary relief is called for, and if so, its nature. In view of the nature of the problem, the Commission will give expedited treatment to petitions in this area. Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. *United States v. Storer Broadcasting Co.*, 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service or growth. With the possible exception of the applicability of our carriage rules (see par. 66), the CATV viewing public will not be deprived of any distant signal service which it was receiving as of February 15, 1966. CATV will not be precluded from bringing new service to underserved areas or from bringing better reception in cities such as New York. With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its grade B contour may freely continue.⁶⁰ CATV expansion into markets below the top 100 may also continue and will be the subject of Commission scrutiny only upon petition in a particular case. Thus, we have confined our special attention to the area of most concern—the top 100 markets where UHF stations are most likely to be coming into existence. And, in line with our present general policy in dealing with microwave applications (see par. 49, notice, 1 F.C.C. 2d at p. 471),

⁶⁰ If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

we have specified no "freeze" but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure.

152. *Legislative proposals.*—The foregoing discussion treated matters in part I and paragraph 50 of the notice of proposed rulemaking. The remaining matters in part II of the notice will be considered on the basis of the comments filed in that part and the experience gained. For the reason also, this report is designated as the second report. We turn now to a brief discussion of the legislative proposals which we believe are desirable.

153. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. See notice, paragraph 31, 1 FCC 2d at page 465.

(ii) We believe that congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128-129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire-pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire-pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See paragraphs 131-138.⁷⁰ Several parties

⁷⁰ The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by station WNDU-TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU-TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA television committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA television committee, Jan. 10-12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

such as NBC have urged that a section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting congressional (and Commission) consideration, including such aspects as how a "re-transmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

CONCLUSION

154. Authority for adoption of these rules is contained in sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of section 1 that the general purpose of the act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by Federal authority"; of section 303(h), "to establish areas or zones to be served by any station"; of section 307(b), to make "a fair, efficient, and equitable distribution of radio service" among the several States and communities", section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule-making power bestowed upon the Commission in sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest." Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC v. Pottsville Bctg. Co.*, 309 U.S. 134, 138; see also *NBC v. U.S.*, 319 U.S. 190).

155. In this connection, we stress that we are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of great change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire Nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth. But we cannot make that judgment in the record now before us—and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the Nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at

the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.

156. Accordingly, *It is ordered*, This 4th day of March 1966, that the rules contained in the attached appendix D are adopted, effective April 18, 1966; *Provided, however*, That the provisions of section 74.1103 are not effective as to existing operations of nonmicrowave CATV systems until 60 days thereafter, and provided further that the provisions of sections 74.1105, 74.1107, and 74.1109 are effective immediately upon publication in the Federal Register.

It is further ordered, That pursuant to section 403 of the Communications Act, all CATV systems in operation on April 18, 1966, shall within 30 days thereafter file with the Commission the information described in paragraph 99 of this report.

It is further ordered, That the proceedings in docket No. 15971 *Are not terminated* and that, in light of the comments on part II of docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in the attached appendix C or additional rules may be adopted.

It is further ordered, That the proceedings in dockets Nos. 14895 and 15233 *Are terminated*.

APPENDIX A

Comments and/or reply comments on part I and paragraph 50 of this proceeding were filed by:

AFL-CIO affiliated labor organizations
 Allied Artists Television Corp.
 American Broadcasting Co.
 American Cable Television, Inc.
 American Farm Bureau Federation
 American Telephone & Telegraph Co.
 Aroostock Broadcasting Corp.
 Association for Competitive Television
 Association of Maximum Service Telecasters, Inc.
 Black Canon Broadcasting Co.
 Bonneville International Corp.
 Clearview of Georgia, Inc.
 Columbia Broadcasting System
 D. H. Overmyer
 Entron, Inc.
 Eastern Educational Network
 Fuqua Industries, Inc.
 G. T. & E. Service Corp.
 Houston Post Co.
 International Telemeter Corp.
 Jack O. Gross, d/b/a Gross Broadcasting Co.
 Jerrold Electronics Corp.
 Journal Co.
 Joint comments of stations KHOU-TV, KOTV, KXTX, WANE-TV, WAVE-TV, WFIE-TV, WFRV, WISH-TV, WJXT, WMT-TV, WNOK-TV, WTOP-TV
 Meredith Broadcasting Co.
 Mesa Verde Broadcasting Co., Inc.
 Micro-Relay, Inc.
 Midwest Television, Inc.
 Mobile Video Tapes, Inc.
 National Association of Broadcasters

National Association of Educational Broadcasters
 National Broadcasting Co.
 National Community Television Association, Inc.
 National Educational Television
 National Farmers Union
 National Grange
 Phillips, Nizer, Benjamin, Krim & Ballon
 Rogers TV Cable, Inc.
 Rust Craft Broadcasting Co.
 San Diego Telecasters, Inc.
 Smith & Pepper (on behalf of over 150 CATV systems)
 Snyder & Associates
 Springfield Television Broadcasting Corp.
 Storer Broadcasting Co.
 Superior Broadcasting Corp.
 Taft Broadcasting Co.
 Telerama, Inc.
 Triangle Publications, Inc.
 Tri-State TV Translator Association
 Trans Video Corp.
 TV Cable Service of Abilene, Inc.
 U.S. Independent Telephone Association
 West Central Broadcasting Co.
 Westinghouse Broadcasting Co., Inc.
 Western Slope Broadcasting Co., Inc.
 WGAL Television, Inc.
 WJAC, Inc.
 WKBH Television, Inc.
 WTVY, Inc.
 William L. Fox

APPENDIX B

SUMMARY OF COMMENTS ON PARAGRAPH 50

National Community Television Association (NCTA) urges that a rule along the lines of the policy adopted in paragraph 49 and proposed in paragraph 50 is "completely arbitrary," "unnecessary," and "would be a virtual prohibition to provide CATV service in such communities (NCTA comments, pp. 13-14). By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14-22) from the discussion in the Seiden report concerning "CATV in Three-Station Markets" (pp. 84-86) and from the Fisher report concerning the effect of noncarriage on audience and revenues where there are three or more off-the-air program alternatives (pp. 91-92). NCTA states that the Seiden and Fisher conclusions "show conclusively that there is absolutely no basis for allegations of CATV as an adverse factor in the potential development of UHF television in large cities" (NCTA, exhibit B, pp. 22, 32). NCTA asserts further that there is no criterion for determining whether a CATV system might at some time have the effect of delaying construction of a UHF station in a three-station market (NCTA comments, p. 14, exhibit B, p. 31). Finally, it states that the existence of a CATV system in a community has not in the past prevented construction of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed paragraph 50 rule principally on the ground of alleged lack of jurisdiction over CATV systems. It is asserted in addition that CATV will help UHF by providing good quality reception to an immediate audience prior to all-channel set saturation. Because of this, some UHF permittees in major cities have indicated no objection to CATV entry. It is further asserted that the success of independents will ultimately depend on their ability to provide a program service which will attract viewers and advertisers. International Telemeter Corp. states that if and when CATV systems are established on a broad base in large metropolitan areas, they may well be utilized for pay-TV operations as an adjunct to other forms of wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid.), "this is not to say that the public interest will not be served by the result * * *"; "the multiplicity of services via wire television systems can only serve, not harm, the public interest."

The comments of the American Broadcasting Co. (ABC) support the proposal. ABC states that a CATV operator in a market such as Philadelphia could carry the several New York independents to the very serious detriment of the local Philadelphia UHF stations, and that the carriage and nonduplication rules presently adopted by the Commission are not truly responsive to the "unexpected fractionalization of the audience interested in independent programming." ABC therefore believes that the Commission should "establish the areas or zones" normally to be served by television stations and delineate the circumstances under which a station's signals may properly be brought to areas not within its normal service area. It asserts that interim rules, pending the adoption of final rules in part II, are needed because once CATV systems are established in markets that have a potential for independent UHF station development in the reasonably near future, the Commission will find itself in the impossible position of trying to undo what has already been done—of possibly adopting a regulation which would deny to substantial numbers the service which they assumed they would receive and for which they have already paid. ABC therefore urges the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations (or two such stations with a third station already authorized). ABC states that such a rule would apply basically to all but three of the Nation's top 100 markets and therefore to those areas which now or shortly will have three or more local network services and the reasonably immediate likelihood of a fourth commercial service; that with this amount of service, these areas do not have any pressing need for additional service via wire, and they are also the areas which hold the most possibilities for UHF development; that the interim procedure would insure that a significant pay-TV service would not be established while the Commission is reaching its final decision in this proceeding and in the pay-TV rulemaking proceeding that has recently been requested; and that at the same time, the interim procedure will not preclude the development of CATV in these relatively underserved areas where it serves as a needed adjunct to free television service. Above all, ABC stresses that the proposed rule will prevent the establishment of CATV systems in areas and under conditions which the Commission may ultimately conclude would inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It urges a restriction upon the importation of signals into communities situated within the grade A coverage of four or more commercial TV assignments and communities within the grade A coverage of three or more commercial stations actually in operation (with exceptions (i) for two station markets with an outstanding construction permit for a third station where such permit is not activated within 6 months, and (ii) to areas within the grade A coverage of three stations not receiving the full service of the three networks because of the existing network affiliation relations). It asserts that many applicants for CATV franchises in big cities today are promising to deliver such stations as WOR-TV and WNEW-TV, New York, and WGN-TV, Chicago; that these are well-established, independent stations in major markets, and, compared with a UHF station just getting started in another city, have a much greater economic base to make major expenditures for programming; and that the local UHF station, competing with these major stations for what is at best a limited audience (i.e. the audience for nonnetwork programming), will be unable to get a large enough share of this audience necessary for it to produce the income needed for the station to buy programming with which it can *in fact* compete for viewers with the other stations on the system. It states that CATV only brings its service to some viewers—those fortunate enough to live in areas with a large enough local population to furnish an economic base for the laying of CATV cable, and then only those living in such areas who can afford to pay CATV fees. Westinghouse asserts that CATV in big cities also has the obvious potential of transforming itself into pay-TV, and points to recent news reports that tell of a company which was unsuccessful in its efforts to operate a pay-TV system in one city in Canada and is now planning to take over a successful major CATV system in another Canadian city and convert it to pay-TV in whole or in part. Finally, Westinghouse stresses the need for an interim rule, stating that once CATV franchises are granted in the larger markets and construction of the systems

is commenced pursuant to those grants, the Commission, from a practical and political viewpoint, will have lost effective control of the situation in those areas.

Storer Broadcasting Co. also supported the proposal because, it asserts, there is a definite probability of serious impact on television development in such cases, and the Commission cannot, through inaction, permit events to occur which jeopardize the goals set by the Congress and the Commission looking toward a competitive nationwide system of intermixed local television facilities. It urges that there is an established immediate need to "hold the line," during the interim period, on importation of distant signals to the major markets where CATV's "present stampede" into these markets might destroy the independent stations' audience potential "through importation of competitive programming on unequal terms" (Storer comments, p. 12). Storer also states that if the policy is to be effective, it should be applied to affiliated as well as independent UHF stations, and that it should be extended to CATV systems in nearby communities upon which the UHF depend for audience circulation. It asserts that a UHF station, although nominally a network affiliate, may still rely largely on independent programming, and that therefore its development requires the same protection as that proposed for independent UHF operators; and that CATV systems in nearby communities "can impose drastic damage on that station's audience circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Television, Inc. (Midwest), and the joint comments of KHOU-TV, KUTV, KXTX, WANE-TV, WAVF-TV, WFLE-TV, WFRV, WJXT, WMT-TV, WNOK-TV, WTOP-TV (joint comments) all urge the adoption of interim procedures going beyond those proposed in paragraph 50. The factual basis of AMST's and Midwest's comments have been described in part (see pars. 31-41). In addition, AMST cites the experiences of the UHF station in Lock Haven, Pa., and of UHF station WRLP, Greenfield, Mass., in the face of CATV competition. AMST asserts that the importation of outside large city independent television stations by CATV will be an obstacle to the development of a fourth network, since it will jeopardize the development of the UHF stations in these cities. AMST also states that the entry of CATV into larger cities poses a substantial threat to the development of network UHF service, citing in support statements made to the Commission or to the Congress of Rust Craft Broadcasting Co., permittee of WJKS-TV, Jacksonville, Fla., and WCOB-TV, a new UHF station in Charlotte, N.C. Midwest describes the explosive growth of CATV in the Peoria-La Salle area, the Springfield area, the Champaign-Danville area, the WCIA service area generally, and the San Diego area (see pars. 34, 39-41). The joint comments assert that proposals to bring multiple distant signals into areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indianapolis, Ind., jeopardize or foreclose the development of new UHF stations in these areas. The joint comments point out that in the area served by the existing Sacramento-Stockton stations, CATV systems have been franchised or have commenced operations in at least 31 communities, and applications for franchises have been filed or proposed in at least 18 more—including Sacramento and Stockton themselves; that the total number of households in these cities and communities is more than 250,000, representing a major portion of the audience now served by the three existing Sacramento-Stockton commercial stations and a still more substantial portion of the audience which would be served by KPXL, the newly authorized UHF station on channel 29 in Sacramento; that as the permittee for the new UHF station in Sacramento has informed the Sacramento City Council, the importation of outside signals from San Francisco-Oakland and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments propose the interim rule that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing, (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; and (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service.

in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It states that an alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule, (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit the development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(a) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, direct off-the-air local or area television service, and (b) the providing of fill-in service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that if there are indeed situations in which a CATV entrepreneur can show that he will aid rather than threaten the maintenance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which could ultimately have four television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the grade A contours of those existing or imminent stations. AMST states that there is no reason—at least in the interim—to allow CATV to retard UHF development in any market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in the station's service area beyond its grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programming and ineffective programming.

APPENDIX C

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio . . . and to all persons engaged within the United States in such communication . . ." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of . . . pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of . . . pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or

radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).¹ Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).² The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. *California Interstate Telephone Company v. F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; *Pacific Teletronics, Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry. *Clarksburg Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the act are applicable (secs. 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311.³

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order).⁴ See *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to—

- perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
- make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * (303(f));
- establish areas or zones to be served by any station (303(h));
- make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act * * * (303(r)).⁵

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (e.g.,

¹ It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

² Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

³ It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

⁴ In addition, as noted in the notice, there exists the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

⁵ Secs. 303 (f), (h), and (r) are preceded by the following clause:

"Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity requires shall * * *."

secs. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).⁶ The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 215-220, the Supreme Court citing, *inter alia*, sections 1, 303(f), and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,⁷ the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203. See also, *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219, where the Supreme Court stated:

True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.⁸

⁶ Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40-41.

⁷ See also, *Stahlman v. F.O.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822-8823, 10313-10314, 10990): 66 Congressional Record 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

⁸ The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217-218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the larger and more effective use of radio in the public interest. We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its

To the same effect in other fields, see *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342; *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110; *U.S. v. Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc. v. U.S.*, 344 U.S. 298; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

Included in the act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rulemaking power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a) (19).

We point out that section 204(a) (6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a) (19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the act," stating (at pp. 309-310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-220; * * *. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * *.

See also, *Public Service Comm. of N.Y. v. FPC*, 327 F. 2d 893, 896-97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucking Assn. v. U.S.*, 344 U.S., at 314-315; *National Broadcasting Co. v. U.S.*, 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission"). The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity

signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

* The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Sec. 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

* The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark v. Wickard*, 321 U.S. 288; *NLRB v. Atlantic Metallic Casket Co.*, 205 F. 2d 931 (C.A. 5). Cf. *Peters v. Hobby*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.

of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition," but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363-364). The notice of inquiry and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 408); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

APPENDIX D

I. Part 21 is amended as follows:

1. In section 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

§ 21.710 DEFINITIONS

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include, (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 21.712, paragraphs (b), (c), (d) (3), (e), (g), (h), (i), (j) are amended; paragraphs (i) (4) and (k) are added; and note 2 to section 21.712 is deleted:

§ 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an

unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(d) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) of this section,

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until 30 days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1.—As used in § 21.712(b), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In section 74.1, paragraph(c) (4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 SERVICES COVERED BY THIS PART

- * * *
- (d) Community antenna relay stations (subpart J).
- (e) Community antenna television systems (subpart K).

2. In section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 DEFINITIONS

- * * *
- (e) As used in §§ 74.1031 and 74.1033.

(1) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's grade B contour shall be deemed an extension of the originating station.

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

§ 74.1031 ELIGIBILITY AND CONTENTS OF APPLICATION

(c) An application for any authorization subject to § 74.1033 shall contain a statement that the applicant(s) have notified the licensee or permittee of any television station, within whose predicted grade B contour the CATV system(s) operate or will operate, in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of each such system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of filing by the applicant(s), identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television, standard broadcast, and FM station(s) whose programs will be distributed by each such CATV system.

NOTE 1.—As used in § 74.1031(c), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In section 74.1033, paragraphs (a), (b) (3), (c), (e), and (f) are amended; paragraphs (g) (4) and (h) are added; and the note to section 74.1033 is deleted.

§ 74.1033 LICENSING REQUIREMENTS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of

equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

5. A new subpart K is added to read as follows:

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

Contents

- SEC. 74.1101 Definitions.
- SEC. 74.1103 Requirements relating to distribution of television signals by community antenna television systems.
- SEC. 74.1105 Notification prior to the commencement of new service.
- SEC. 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.
- SEC. 74.1109 Procedures applicable to requests for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 DEFINITIONS

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

§ 74.1103 REQUIREMENT RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 NOTIFICATION PRIOR TO THE COMMENCEMENT OF NEW SERVICE

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or will operate, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until 30 days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least 30 days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within 60 days after obtaining a franchise or entering into a lease or

other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least 30 days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within 30 days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided*, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within 30 days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

NOTE 1.—As used in § 74.1105, the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES

(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system

to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the second report and order in dockets Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within 30 days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within 20 days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument,

evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

III. Part 91 is amended as follows:

1. In section 91.557, paragraphs (a) and (b) are amended to read as follows, and a new paragraph (i) is added as follows:

§ 91.557 DEFINITIONS

As used in §§ 91.559 and 91.561:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" means any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 91.559, paragraphs (a), (b) (3), (c), (e), and (f) are amended; paragraphs (g) (4) and (h) are added; and the note to section 91.559 is deleted:

§ 91.559 AUTHORIZATIONS FOR OPERATIONAL FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

- (1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;
- (2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;
- (3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the cable whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of any of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

3. Section 91.561 is amended to read as follows:

§ 91.561 NOTIFICATION BY APPLICANT

An application for any authorization subject to § 91.559 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system(s) served or to be served operate or will operate, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or

permittees and educational interests. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE.—As used in § 91.561, the term “predicted grade B contour” means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.

I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay-TV, I propose an amendment of the Communications Act to preclude community antenna systems from distributing programs other than those received from transmissions of broadcast stations.

I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the grade B contour, rather than the grade A or lesser contour, as the benchmark for requiring carriage of local TV stations.

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART, DISSENTING IN PART

I concur in the steps the majority has taken, but must dissent to its failure to take other measures which I believe to be critically important. I think we are, indeed, at a crossroads in the development of our television system—and I gravely fear that the majority has taken a wrong turn.

The Commission has had a sorry record with respect to CATV. In the early 1950's when questions were first raised about CATV, the Commission's staff recommended that the agency assert and exercise jurisdiction over this new phenomenon.¹ However, the Commission of that day, not recognizing the potential impact of widespread CATV development, procrastinated and finally declined to assert general jurisdiction. At first, the consequences of that decision were not readily apparent—and were largely confined to small television markets where CATV, in most cases, performed its true supplemental function. Later the impact of CATV competition assumed more serious proportions, and the Commission began to shake off its lethargy. In the *Carter Mountain* case² it denied an application for microwave facilities to serve CATV systems in Wyoming on the ground that the increased competition to a small market television station which would have resulted might have impaired its ability to continue to serve its audience. It indicated that it would grant the applications on conditions designed to protect the station by requiring

¹ See Television Inquiry, hearings before the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., pt. 6, p. 3490 et seq.

² *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).

that the CATV systems carry the local station without degradation of its signal and without duplicating its programs.

Then last April, after more than 2 years of consideration of voluminous comments and special studies by the Commission and the broadcast and CATV industries, we adopted minimal rules with respect to microwave-fed CATV systems and proposed to extend them to off-the-air systems as well. It seemed to me—as I'm sure it did to broadcasters who had become increasingly alarmed by the explosive growth of CATV and its extension into larger and well-served markets—that the Commission had finally taken hold of the problem, 14 years late, but in time to prevent serious damage to the fabric of our television service. The Commission was divided four to two, but the majority, after considering and carefully laying out the unfair competitive impact of noncarriage of local stations or duplication of their programs, adopted rules which I think would have gone far toward preserving the system so painfully developed in this country—and promoting its further growth in the UHF. These rules would neither have destroyed existing CATV systems, nor deprived their subscribers of any programs. Similarly, they would not have blocked all future CATV development, but would simply have moved toward insuring that cable systems perform the valuable supplemental service for which they were originally devised. A reading of our first report and order in dockets Nos. 14895 and 15233, 38 F.C.C. 683, with its careful analysis of competition between broadcast stations and CATV systems—with particular emphasis upon the program exclusivity obtained in the market by broadcasters and its importance to their operations—gives one the clear impression that the majority was concerned first and foremost with the preservation and expansion of our over-the-air television system. While it recognized the important service CATV systems can supply to their subscribers, it insisted that CATV was secondary and subordinate in rank, and should therefore be subjected to quite modest restrictions to favor the primary service.

But now, less than a year later, the tone is different. In the report and order now issued—and even more in the deliberations leading up to the decisions reflected there—there has been a shift in emphasis. There is a subtly heightened importance assigned to the diversity of choice which cable systems provide to *some* television homes,² with a corresponding depreciation of the local service of area stations. There are expressions of concern that we not block the “new” technology of wired television—though the alternative of wired versus broadcast distribution has long been with us, both in radio and television, and it seems to me that CATV's technology, like its programming, is derivative and much less exciting in its possibilities than the over-the-air mode. And there is a tendency to downgrade program exclusivity—which seemed so important last April—and to forget the unfair competitive impact on broadcast operations of the CATV

² As indicated below, I think this is largely due to the vociferous protests, instigated by misleading publicity efforts of certain elements of the CATV industry, of these cable subscribers. While they are a small percentage of the television homes in this country—and usually a minority even in the television markets where they are concentrated—they are still numerous enough to have flooded Congress and the Commission with protests against actions which they were told we were about to take, but which were always exaggerated and sometimes completely false.

practices which we then undertook to regulate. The shift is most obvious in the reduction in the degree of nonduplication protection which is now to be afforded local broadcasters.

Why this change in attitude? I suppose it could be argued that my colleagues who now feel that same-day nonduplication is more in the public interest than the 15 days before and after local broadcast which we specified last April were simply uninformed when they took that action, and therefore made a mistake. They do not advance this explanation, and I am sure it was not true. In fact, they gave much more careful attention to consideration of the details of broadcast and CATV operation last year than they did on this round of discussions.

It would be more normal for such a change in position to be explained in terms of new information which has come to our attention for the first time since our action of last year. This may be the basis for what I regard as drastic impairment of the protection which we then decided should be given to the exclusive program rights a local broadcaster has acquired in the program market—but, if so, it has not been explained to me in these terms. I cannot claim that I have read all the comments in this voluminous proceeding, but in those I was able to examine—drawn from both broadcaster and CATV filings—and in the analysis of all the major comments prepared by our staff, I find no new factual data, and no new arguments, bearing on this issue which satisfactorily explain or justify the abandonment of the 15-day standard previously adopted. And, as suggested above, none of my colleagues have marshaled arguments which they have drawn from the comments to rationalize this new approach. Instead they talk vaguely of balancing interests and minimizing disruption for the subscribers of existing systems not yet subject to the rules, and of the importance of making network programs available to these subscribers on the day they are presented by the networks. If the last of these considerations is so important it seems strange to me that for years we have knowingly permitted television stations to delay network programs for the far more numerous over-the-air audience. Why has no one ever proposed a rule to prohibit this nefarious practice!

The fact is, of course, that except for certain live programs having an element of timeliness—all of which were excluded from the benefits of delayed nonduplication, and are almost never delayed in practice—there is no real urgency about seeing a particular program on a particular day or at a particular time. There may be an element of convenience, but it is one of the disadvantages of the television medium that the viewer must try to adjust his schedule to fit the times someone else—at a network or a local station—has selected for the presentation of his favorite programs, and can change at will. It is important that as many network programs as possible be made available in each market. But as I shall point out below, the nonduplication rule now adopted seems to me to be based on the concept that it is better that the cable subscribers, who are a minority, be able to see every network show on its day of origination than that they be furnished every such show, but with some of them delayed for a short period in order to make more of the most popular shows available to *everyone* in the market, nonsubscriber and subscriber alike.

I would like to discuss in detail the discussion, in the first report and order in the microwave dockets, of the period of nonduplication protection to be required, but time does not permit it. Certainly this was one of the longest and most carefully reasoned sections in the document, occupying nine pages in the printed report (see pars. 101 to 127). I find the explanation now offered for abandoning the result there reached so insubstantial as to be shocking. Consider what the majority says in paragraphs 51 to 56. They start by saying that simultaneous nonduplication is clearly called for—which is hardly startling since even NCTA concedes this. It then notes that in the first report we further determined that “some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds.” I think that sets some sort of record for delicate understatement. After carefully considering the data accumulated in over 2 years, we explicitly found that *15-day* nonduplication, before and after local broadcast, was reasonably necessary to achieve fair competition and preserve the local broadcasters’ hard-won program exclusivity.

Now the majority say they have reconsidered and made a different balance, “in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public.” Well, that was certainly thoroughly understood in April 1965, when we proposed to extend the microwave rules to the off-the-air systems, and to apply them to microwave service being provided under grants made prior to December 1963. That was the object of the exercise! Why the sudden announcement—as if discovered for the first time—that compliance with the rules “would tend to substantially disrupt the viewing habits of the CATV subscribers.” While I don’t think the “disruption” is so great as is suggested, and am satisfied that the subscribers would soon become accustomed to the new schedules, certainly we knew a year ago that *some* change would be effected by the rules—otherwise why go to the bother of adopting them. All we have learned since then is that, by the application of some misleading publicity techniques, several hundred thousand subscribers were frightened into sending protests—usually form letters or cards thoughtfully supplied by the CATV operator—to the Commission or the Congress. While I am no more anxious to face the wrath of an aroused public than anyone else, I think some hazard of that kind is involved in making judgments designed to serve the overall public interest but which injure or offend some part of the public. Furthermore, I think it could be demonstrated to the people concerned that their fears were exaggerated—and that in a rather short time they would adjust to the few scheduling changes which would actually be involved.

In other words, I agree that we should avoid *unnecessary* disruption of established viewing habits, but not that we should do so “as much as possible”—which to the majority apparently means that such concern for established, if fleeting, habits of a very small part of the television audience should shape national television policy, not just for them but for all future subscribers of all future systems as well. The majority says it seeks to preserve “the valuable public contribu-

tion of CATV in providing wider access to nationwide programming." I agree that far, but not that there is any necessity for insuring a wider selection of programs on any particular day for a favored few, when I believe it will deprive others of the opportunity, otherwise available, to see certain programs at all. The basic objective of permitting CATV systems to provide greater access to network programs can be fully achieved, as was pointed out in the first report, under 15-day nonduplication.

The majority then blandly announces that "balancing all the pertinent considerations," they think nonduplication should be cut to the same day for existing systems. I don't know what they balanced, since all they have discussed is the danger that some CATV subscribers—certainly not all of them—would have been required to view some network programs—certainly not all of them—at the times they are broadcast by the local station or stations rather than at the time the cable system would otherwise have brought the programs in from distant stations. The only argument then advanced in favor of this result is that it will eliminate the great bulk of delayed nonduplication requests, citing paragraph 125 of the first report. I think this is an argument for the opposite result! Paragraph 125 read as follows:

125. There remains the question of the precise extent of the restrictions to be imposed upon nonsimultaneous duplication. After examining this question carefully, we believe that the 15-day before-and-after period proposed in our last notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 percent were delayed from 1 to 7 days, 30.2 percent were delayed 8 to 15 days, and 10.7 percent were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts fell off sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

Thus our study showed that 79.1 percent of delayed network broadcasts were delayed from 1 to 15 days, *and this was used as a principal justification for the 15-day protection adopted.* Now it is argued that reducing the protection to the same day is good because it avoids dealing with the problem the rule was designed to handle in the first place! The majority notes, "as an incidental benefit," that this will also "substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules." Quite so—but this is achieved by cutting the heart out of this part of the rules and reducing the rights of the broadcasters to such a low level that their opportunities for causing "disputes" are very slight. What seems odd to me is that we achieve this happy accommodation by favoring the party to this prospective "dispute" whom the first report found to be engaged in unfair competition in the area of program duplication, to the disadvantage of the party whose program rights the rules were designed to protect.

The majority then concedes that its concern about disruption as a result of 15-day nonduplication would not apply to new systems going into service hereafter. Thus even if we must defer to the private interests of a relatively few people in not having their viewing habits modified in the slightest, it is clear that the more effective protection of the

policy adopted in the first report could be applied to new systems since their subscribers would have no established viewing patterns. But the majority does not even adhere to policy in this partial fashion. They say that even here there would be disruption because the subscriber may not be able to view programs from distant stations at the times specified in his TV guide. They are so solicitous of the future subscriber that, again, they completely overlook the interests of the nonsubscriber. What about the "disruption" suffered by the resident of a sparsely settled area who has no cable service, or the urban viewer who can't afford such service, and who read in this same unspecified TV guide⁴ of programs carried on distant stations on the cable but which are not available to them on the local station(s), though they would have been if the local broadcaster's first-run rights had been adequately protected? There has been a lot of talk that the Commission's regulation of CATV operations would make second class citizens of cable viewers. It seems to me that the majority has gone overboard in the other direction by shaping policy to accord a ridiculous degree of importance to these people's assumed interests. It's hard for me to weep for the cable subscriber who is going to receive more stations—though probably no more real services—than the people of New York City but who, we are now told, must not only have this wealth of program choice but must also have every program available to him the same day it is made available to viewers in New York.

I would like to expand upon the impact I think this curtailed protection will have on the nonsubscriber. In one- and two-station markets the local broadcaster tries to put together the best possible schedule for his viewers, drawing on more than one network. Since conflicts are almost inevitable between the more popular programs of the competing networks, this has customarily meant that most of the programs are presented at the time of network feed, if the station is interconnected, but some are broadcast on a delayed basis. While some CATV interests have sought to denigrate this practice by calling it "cherry picking," it seems clear to me that it has served—and would continue to serve—the public interest by making available in markets with less than three stations the best of the offerings of all three networks. And delayed broadcasting serves the public even in a three-station market, by permitting the local affiliate to rearrange the network schedule, to the limited degree his network and its advertisers will permit, in order to present a service which he thinks is more in the interest of his local audience. I think such local flexibility is in the public interest and should be preserved. A couple of years ago the Commission abolished option time and struck down CBS's incentive compensation plan because, in part, they impaired the local station's independence in reaching decisions as to clearance for programs offered it by its network. I think the clear result of the restricted nonduplication protection now being afforded will be to impel every station located in a three-station market and carried on CATV systems serving a substantial percentage of its audience to clear live for all the network shows it plans to pre-

⁴ Certainly if 15-day protection were afforded the CATV operator would not publicize locally any programs he could be required to delete, but would tell his subscribers when they could watch the programs on the cable on the local station.

sent. I do not think this straightjacketing of the local broadcaster is desirable.

I think the impact will be even greater in markets with one or two stations. To the extent they now delay network programs—which 15-day nonduplication was specifically designed to protect—I think such stations have been providing a service to their audiences. I think they will now be sharply restricted in their ability to continue this service—if not totally precluded from doing so. As long as only a small part of their audience is served by cable systems, they can probably continue to present programs on a delayed basis even though some of their potential viewers will have seen the program a short time earlier. But if and when cable subscribers become a really significant factor in the market—and such operations are expanding at a rapid pace—then the broadcaster will not, I think, be able to continue to present programs selected from more than one network. It will be difficult enough to compete with the current offerings of a substantial number of distant stations—probably located in a larger market—without trying to do so with a program which a third, a half, or more of the local station's audience have already had an opportunity to watch. The majority, in paragraph 51, tries to shore up its argument about “disruption” as to new systems by saying that it is because of such concerns that some broadcasters, although entitled to 15-day protection, have requested only simultaneous nonduplication. In paragraph 116 of the first report we stated that NCTA had shown “a few instances” of such concessions by broadcasters, but did not regard this as of decisional importance. In the cases I know of where broadcasters who were entitled to *no* protection under the rules were able to bargain for simultaneous nonduplication, the result has been that they present no delayed programs, or at most one or two.

The majority seeks to support its refusal to give greater nonduplication protection as to new CATV systems by arguing that it is obviously preferable to have one set of rules for all systems. Of course I would prefer that, too, though I think the single rule should provide for 15-day protection. But we quite often adopt tightened rules which would bear harshly on existing operations, and in most cases we handle the problem by grandfathering the situations which have already developed and applying the new rule prospectively. That is exactly what we could do here—and should do since my colleagues are unwilling to inconvenience the subscribers of existing cable systems. This is common governmental practice, and often involves much more substantial discriminations than would be the case here.

The majority then turns to the question whether it should retain 15-day nonduplication protection for nonnetwork programming. It decides not to do so for the surprising reason that it afforded minimal protection at best. In other words, having given very restricted nonduplication protection to nonnetwork programs out of concern for CATV systems (see par. 123, first report), the Commission now withdraws even that effort to insure the local station of a small fraction of the program exclusivity for which it has bargained. Why, then, did we make this provision last April, when we knew as much about this aspect of the matter as we do now? I agree that 15 days is no enough,

and am satisfied that we will do serious damage to the present method of program distribution unless we give the broadcaster at least protection of his right to be the first to present each program he purchases for his market. The majority says it has determined that we must look elsewhere if we are to achieve effective relief in this respect. This refers to some extension of the concept of permission to rebroadcast to cable operations. I think that this requires legislation, which may take a long time—and in any event I do not think it will necessarily provide the protection the majority seems to be seeking—though not very aggressively. The legislative proposal we have submitted to Congress calls attention to the problem but makes no specific recommendation. In paragraph 152(iii) the majority concedes that they are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. That being the case, I do not think they are in a position to abandon the only protection now given the broadcaster—minimal though it is.

The majority drops an interesting footnote to paragraph 55, in which it says that same-day nonduplication affords "substantial" protection to the most popular network programming so that "most network affiliated stations should be viable." [Emphasis supplied.] It must be encouraging to broadcasters faced with serious and growing CATV competition to know that the majority thinks that not too many of them will go under—with loss not only to the businessmen concerned, but also to the local audiences they serve.

In paragraph 56 the majority concedes that conflicting public considerations are presented—though they have carefully avoided mentioning a single factor favoring retention of 15-day protection—and conclude that their resolution constitutes a fair compromise. I fail to see much evidence of this alleged balancing of competing interests. It seems to me that zeal to avoid at all costs any disruption to existing cable subscribers has carried the day. I don't think this matter was really in issue at this stage of the proceeding. We did indicate that we wanted comments as to policy with respect to duplication of programs broadcast by the local station in black and white but available in color on a distant station on the cable. The parties duly addressed themselves to this question. But as to the extent of nonduplication protection, I think the general understanding was that we had reached a careful decision of this issue last April in adopting the microwave rules, and that if we adhered to our tentative conclusion as to jurisdiction over all CATV, there would be no change in this provision of the rules unless (1) experience with the microwave rules uncovered flaws, or (2) someone demonstrated that off-the-air systems are so different that these rules could not appropriately be carried over to them. I know of no evidence of the former, and no one seriously tried to establish the latter—not even the NCTA, which simply incorporated the arguments it made to Congress last May in an effort to show that certain stations had prospered without delayed nonduplication.

But without any such showing of a need for change in the comments filed in the proceeding, the majority has abandoned the position it developed so carefully last year. I suppose this simply proves the power of the pen when wielded by thousands of indignant members

of the public—even when they have been intentionally misled into writing in the first place. I think this provides an interesting—though rather depressing—chapter for students of the administrative process.

I agree that same-day nonduplication takes care of the time zone differential problem, but that's about all that it does over and above simultaneous nonduplication which NCTA was willing to concede months ago. The majority says it will afford the station affiliated with more than one network "some leeway" in presenting the most attractive programs of each, but then indicates just how much leeway the broadcaster has by reminding him that he must present it the same day the network did and that prime-time programs must be broadcast entirely within prime time. It may be that he can shoehorn in a few programs on this basis, though I believe it will require some changes in policy by some of the networks—and will certainly involve added expense for the station. Thus if it has been delaying network programs through the use of film, it would have to buy a videotape machine—and that's no small expense item, especially if he has to be able to handle color in order to be entitled to protection. Further, unless the network in question provides him an advance feed, he will have to have two loops into his studio, one for the live broadcast going out over the air and the other to feed the tape machine with a program coming in at the same time from another network. Since one- and two-station markets are usually small, this may pose serious problems for the broadcaster, and he may simply throw up his hands and carry the full schedule of a single network to avoid trouble and expense. If he does, the public will lose by it—and so will he, in terms of lowered average audience. I much prefer the greater flexibility permitted by the 15-day rule, and do not think the majority has even addressed themselves to this problem—much less assured themselves that what they speak of is feasible.

The majority inserts another footnote at this point, noting that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ hours and 11 hours per week, respectively. They cite paragraph 108 of the first report, which also shows that in one-station markets the range was from ½ to 23½ hours, and in two-station markets, from 1 to 42½ hours. So when they concede that the median is not insignificant and that there will be some detriment to the public if the local station curtails delayed broadcasts, they must also recognize that for half the markets involved (84 one-station and 57 two-station) the impact will be more severe. Nonetheless, they console themselves with the thought that the amount of delayed broadcasts is not too large in the median market. But what puzzles me is that it was unwillingness to "disrupt" established viewing patterns as to these very same programs which led them to cut back on nonduplication protection. If they worry about showing these 5½ or 11 hours of programming at later times to CATV subscribers, why are they so nonchalant about the risk that the equal, or greater, number of nonsubscribers may lose all, or a substantial part, of that programming? I would think that any sensible balancing of equities here would favor the nonsubscribers.

The other area of my disagreement with the majority concerns their treatment of the major market, distant stations issue. Since they will do no more, I support what they have done. However, I would have favored a broader rule—which I am sure that would be easier to administer than the policy of multiple petitions, waiver requests, and hearings to which we are now committed.

Certain of the broadcast entities filing comments in this proceeding urged us to exercise our authority under section 303(h) of the act "to establish areas or zones to be served by any stations." It was variously suggested that this be done by limiting CATV systems to carriage of stations providing a specified signal over the communities in which they are located, or by specifying a maximum mileage beyond which no station's signal should be extended. This is clearly an aspect of our responsibility for allocations—an area in which even critics of the Commission concede our authority, and in fact recognize that the agency was created primarily and specifically for this purpose. We have thus far exercised this authority in television by establishing a carefully designed table of channel allocations and by fixing maximum limits on heights and powers. While there are many situations in which deficiencies in service can and should be corrected by supplemental means such as CATV, satellites, and translators, I do not believe that any of these auxiliary services should be permitted to disrupt the basic television system that Congress, the Commission, and the broadcasters have worked so hard to establish.

It is precisely because one of these supplemental services, CATV, has taken a new and unexpected course that we are involved in this proceeding. I think its explosive development poses a threat of disruption to our television broadcast system, and that this is therefore the time to take hold of the problems presented and to fit cable operations into an appropriate place in the overall television structure. While the majority has undertaken to deal with part of these problems, I think it is not doing so in allocations terms and will, as a result, be unable to deal with the situation soundly, consistently, and expeditiously.

The majority contents itself with saying that CATV entrepreneurs seeking to bring distant signals—that is, signals carried beyond the originating stations' grade B contours—into the top 100 television markets will be required to demonstrate, in an evidentiary hearing, that they will not impair UHF development there or serve as a springboard to pay-TV. I would greatly prefer an approach which would bar new systems—for a 5-year period which would allow time for UHF growth and, perhaps, resolution of the copyright question—from extending any station's signal beyond its grade B contour, except upon authorization by the Commission in certain carefully defined situations. For example, I think we should permit greater extension of service by CATV systems where they carry signals into communities not receiving three network service over the air. But without some such limitation which would stem the proliferation of cable systems in areas already receiving substantial television service, I am afraid that CATV will stunt future growth of our free television system, and perhaps even impair the viability of some of the stations now serving the public.

Even assuming that we should employ the majority's hearing procedure, instead of a rule which I think might be sounder legally and certainly simpler to manage, I would not cut it off at the top 100 markets. While it is true that much current UHF activity is centered in these major markets, and that the risk of CATV becoming pay-TV on the basis of signals appropriated from the broadcasters is greatest there, I think there are compelling reasons for treating the smaller markets in the same way.

It seems to me that the majority's concerns about economic impact and fair competition apply with even greater force in these smaller markets. Certainly many of the more than 130 stations in these markets are marginal operations, and therefore much less able to withstand duplication of their programs and fragmentation of their audiences than the more profitable stations in larger cities. I therefore do not think it is logical to subject them to greater exposure to CATV competition than the stations in major markets, which may well be the effect of the majority's different treatment of the smaller markets.

One ground for this cutoff at the 100th market given by the majority is the fact that any delay incidental to the hearing procedures required is mitigated by the fact that the major markets generally have a considerable amount of service now, plus the prospects of new service. However, most of the markets from 75 to 100 have not more than 3 existing stations, while 20 markets below 100 also have 3 or 4 stations. It is true that the larger the market, the greater the likelihood that someone will be interested in building a fourth station. However, there has been interest in UHF stations to provide a fourth service in markets as far down as the 93d, and it seems likely that if favorable conditions can be maintained, in due course such developments can be expected in still smaller markets. Similarly, there should eventually be interest in putting third stations on the air in the 34 small 2-station markets. Beyond that, the Commission has made many allocations of single UHF channels to medium sized communities, and is presently proposing a class of low-power community stations to serve many more even smaller communities. Unless all these plans are to fail, the purposes of Congress in enacting the all-channel legislation to be frustrated, and this country to be left with a stunted television system, our regulation of CATV operations must channel their growth in ways which will not add to the problems facing upcoming UHF stations.

While the majority's proposal does not exclude the smaller markets from all relief, it at the very least raises procedural difficulties which I think impose unreasonable burdens on the very stations least able to bear them. In the first place, they must initiate the proceeding to consider the role of CATV in their market, while in the top 100 markets this burden is upon the CATV applicants. Then it seems to be suggested that different presumptions apply here, or that the burden of proof is shifted to the broadcaster, whereas in the larger markets it is on the CATV operator. It seems to me that in *all* markets the burden should be upon the CATV interests to demonstrate that their projected operations will not damage or destroy local broadcast service.

Of critical importance, of course, is what happens while the Commission is pondering these cases. In the major markets, presumably CATV activity must halt until we approve their entry. In the smaller markets, however, they can go ahead unless and until we act favorably on a request for stay.

Furthermore, the majority makes clear that in the top 100 markets private agreements between broadcasters and cable operators, though to be given weight, will not be controlling. However, this proviso apparently does not apply below the 100th market, and I'm afraid some broadcasters or prospective broadcasters in the smaller markets, faced with the added burdens outlined above, may try to work out arrangements whereby they will acquire partial interests in the CATV systems proposed for their areas in return, in part at least, for not instituting procedures to protest the CATV developments. While this may, to some degree at least, solve their personal financial problems, I am not sure it will adequately protect the public's interest in its available and potential free broadcast service. I certainly hope the small broadcasters will not take this course, but under the majority's procedures CATV can spread unchecked in these small markets unless someone—a broadcaster or a prospective applicant—goes to the trouble and expense of filing a protest.

One final thing concerns me about this different treatment of the smaller markets—I am afraid it will undercut our policy in the top 100 markets. If we permit the signals of the New York City independents to be put on CATV systems in smaller markets scattered around the country in areas falling between major markets, it seems to me this will create pressures to relax our policies so that the same service can be offered there. In paragraph 54 the majority justifies its failure to continue 15-day nonduplication as to new CATV systems by saying it would be anomalous to have different rules applicable to propose here. If they think that cable subscribers would object to mere delay in presenting programs that people in neighboring towns can see on the day of network release, what do they expect to happen when people in the top 100 markets find that they cannot get a service available to residents in smaller towns all around them?

The only way to deal realistically with this problem is to impose limits on the distance to which signals can be carried. I would treat all communities receiving usable services of the three networks alike, and require a showing in every case before permitting institution or extension of CATV operations employing distant signals.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER RE SECOND
REPORT AND ORDER IN CATV PROCEEDINGS

I concur in the substantive provisions of the order but I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts.

The opinion (here called "second report") which purports to support the present order seems to me to illustrate many of the worst aspects of the institutional decision. The opinion does not really rationalize or justify the result reached, but rather accepts it some-

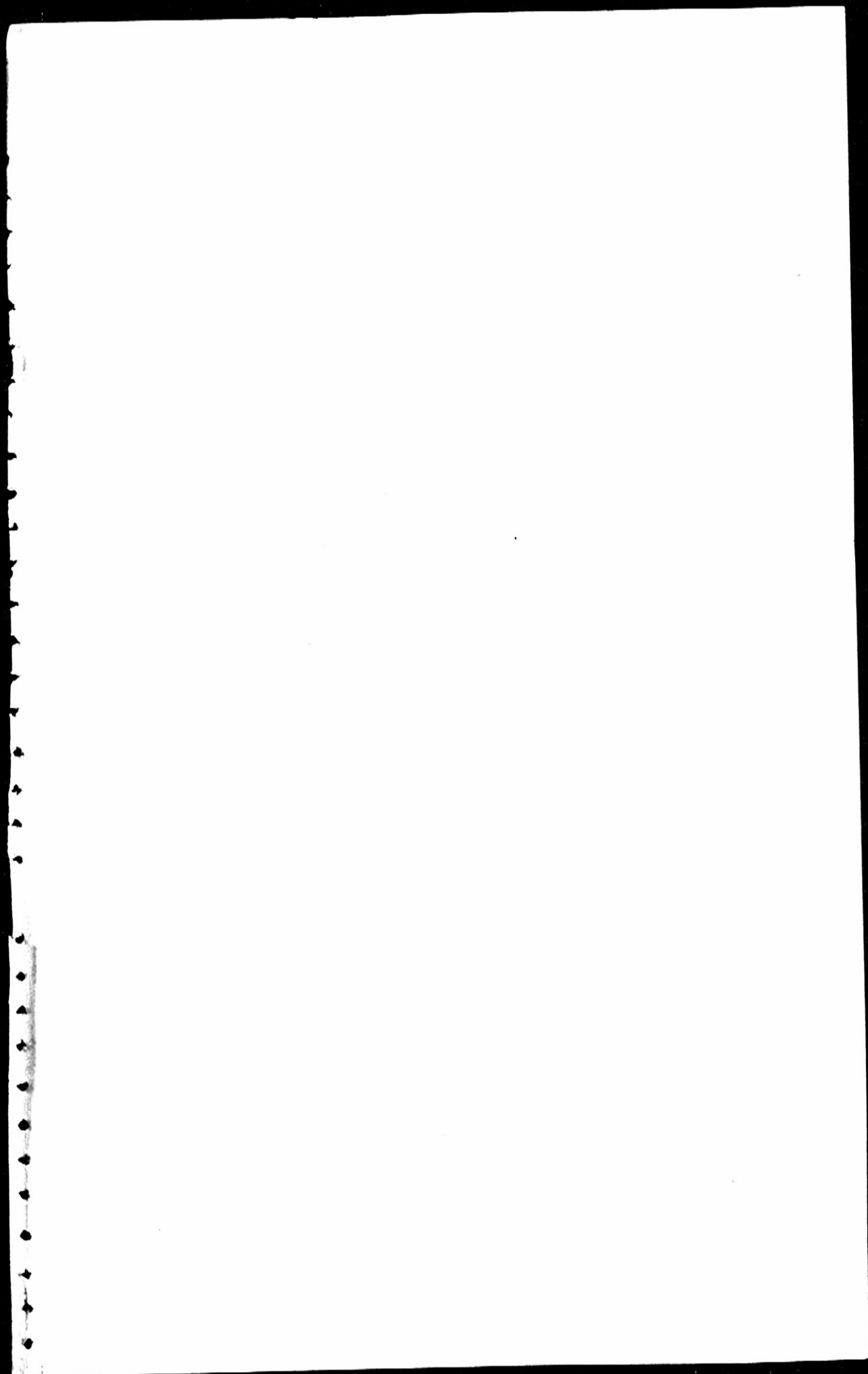
what grudgingly. This is a product of the fact that the opinion was originally drafted by the staff to support an entirely different result. Despite the efforts and instructions of the Commission, and a series of revised drafts, the instant opinion is substantially similar to the document which was written to support a different result. The opinion refers to little evidence and much of that is inconsistent, assumptions and speculation substitute for facts, the reasoning is circuitous and illogical, and the statement is so turgid and prolix that it does more to obscure than illuminate the subject. I can concur fully only in paragraphs 97, 98, 150, and 156 to the extent of my concurrence in the order.

What the Commission is doing in the instant order is to exercise its quasi-legislative powers. Consequently the decision to issue or join in the instant order is a legislative judgment. I concur in the substantive provisions of the order not because I think it is wholly logical or the best method of dealing with the subject, but because it seems to me to be the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission. This is, in my opinion, a legitimate basis for making a legislative judgment.

On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. (38 FCC 683, 746 (1965).) Accordingly I adhere to that opinion and to the conclusions stated there.

The Commission rule requiring a hearing before CATV is permitted to commence operation in any of the 100 largest markets is particularly questionable. The ostensible justification is that CATV might become pay-TV. This reason is flimsy, since that danger—if it is a danger—could be met much more easily by less burdensome requirements.

Nevertheless the substantive position now adopted by a majority of the Commission seems to me to be the most moderate and reasonable compromise of sharply conflicting views and positions that has any practical chance of approval. It is of the greatest importance that the Commission now recognizes the necessity of requesting Congress to legislate on jurisdiction and other important aspects of this matter, and has done so. In these circumstances, I think the most constructive and useful course is to support affirmative action by the Commission, leaving the jurisdictional issue to decision by Congress and the courts, and looking to Congress for further guidance as to regulatory matters. Accordingly I concur in the substantive provisions of the legislative rules now promulgated by the Commission.



JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

**D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING CO., and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,**

Intervenors.

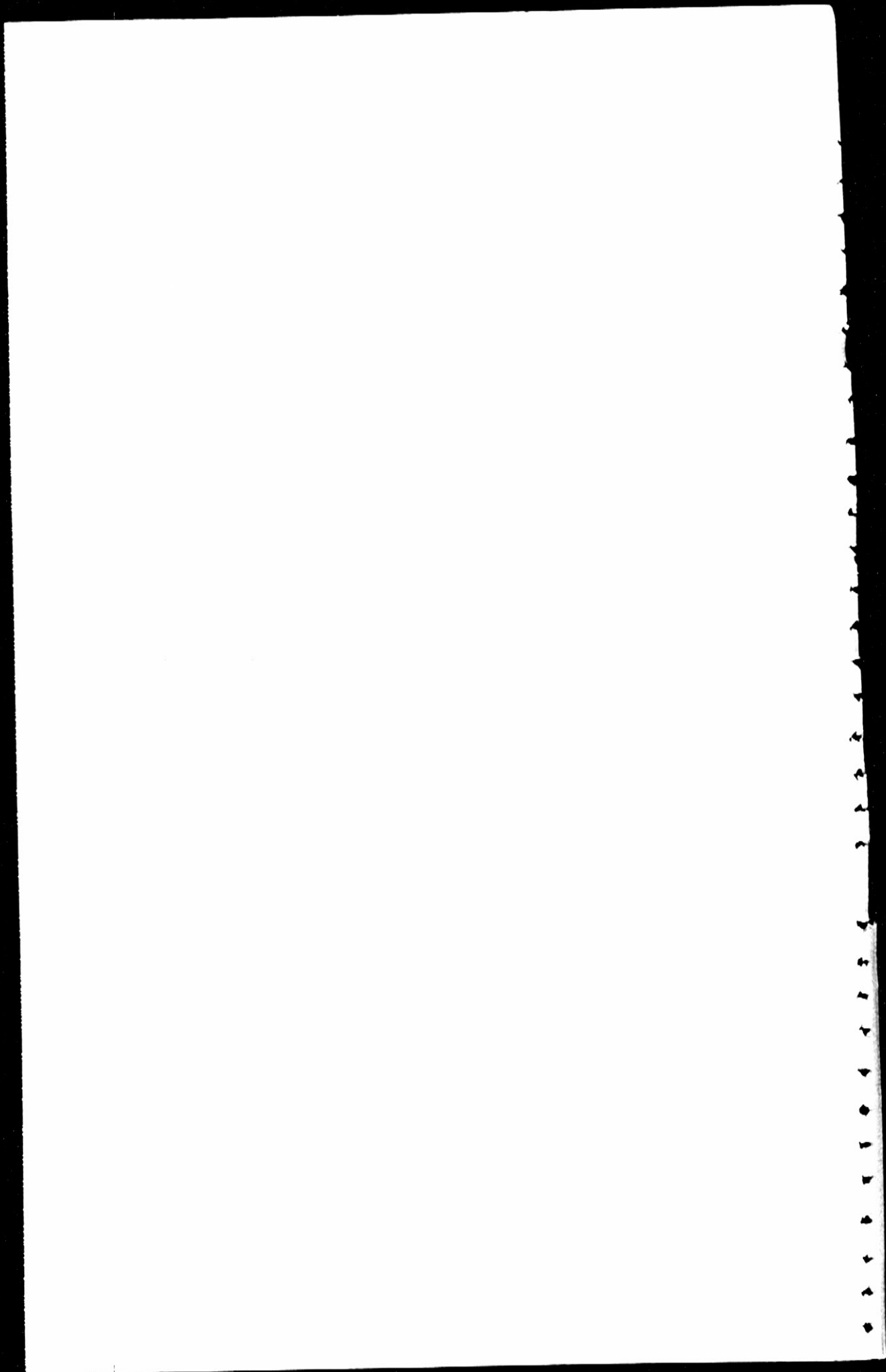
**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

VOLUME II

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 12 1966

Nathan J. Paulson
CLERK



(i)

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FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

79927

PUBLIC NOTICE - G

February 15, 1966

FCC ANNOUNCES PLAN FOR REGULATION
OF ALL CATV SYSTEMS

Following meetings held February 10, 11, and 14, the Commission has reached agreement on a broad plan for the regulation of community antenna television systems, including a legislative program. To insure the effective integration of CATV with a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses, and those which receive their signal off the air. Excluded from these rules will be those CATV systems which serve less than fifty customers, or which serve only as an apartment house master antenna. The CATV rules concurrently in effect for microwave-fed systems will be revised to reflect the new rules adopted for all systems.

Coupled with the new CATV rules, to be incorporated in a Report and Order shortly to be issued, the Commission will send recommended legislation to Congress to codify and supplement its regulatory program in this important area.

The Commission's new CATV program includes eight major points:

(1) Carriage of local stations. A CATV system will be required to carry without material degradation the signals of all local television stations within whose Grade B contours the CATV system is located. The carriage requirements thus made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's

First Report and Order in Dockets 14895 and 15233, adopted in April, 1965.

(2) Same day non-duplication. A CATV system will be required to avoid duplication of the programs of local television stations during the same day that such programs are broadcast by the local stations. This non-duplication protection, as under the existing rules, will apply to "prime-time" network programs only if such programs are presented by the local station entirely within what is locally considered to be "prime-time". It will also give the CATV subscribers access to network programs on the same day that they are presented on the network. Non-duplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system.

The new non-duplication rules thus embody two substantial changes from those adopted in the First Report and Order. First, the time period during which non-duplication protection must be afforded has been reduced from fifteen days before and after local broadcast to the single day of local broadcast. Second, a new exemption from the non-duplication requirement has been added as to color programs not carried in color by local stations.

(3) Private agreements and ad hoc procedures. The Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. Moreover, the Commission will give ad hoc consideration to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules.

(4) Distant City Signals — New CATV systems in the top 100 television markets. Parties who obtain state or local franchises to operate CATV systems in the 100

highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval before CATV service to subscribers may be commenced. This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.

An evidentiary hearing will be held as to all such requests for FCC approval, subject, of course, to the general waiver provisions of the Commission's rules. These hearings will be concerned primarily with (a) the potential effects of the proposed CATV operation on the full development of off-the-air television outlets (particularly UHF) for that market, and (b) the relationship, if any, of proposed CATV operations and the development of pay television in that market. The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market.

Service presently being rendered to CATV subscribers will be unaffected. However, the Commission will entertain petitions objecting to the geographical extension to new areas of CATV systems already in operation in the top 100 television markets.

(5) Distant City Signals — New CATV systems in smaller television markets. The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

(6) Information to be filed by CATV owners. Pursuant to its authority under Section 403 of the Communications Act, the Commission will, within an appropriate time to be prescribed, require all CATV operations to submit the following data with respect to each of their CATV systems: (a) the names, addresses and business interests of all officers, directors, and persons having substantial ownership interests in each system; (b) the number of subscribers to each system; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system.

(7) Assertion of jurisdiction. To the extent necessary to carry out the regulatory program set forth above, the Commission asserts its present jurisdiction over all CATV systems, whether or not served by microwave relay.

(8) Legislation to be recommended to Congress. The Commission will recommend, with specific proposals where appropriate, that Congress consider and enact legislation designed to express basic national policy in the CATV field. Such legislation would include those matters over which the Commission has exercised its jurisdiction, as well as those matters which are still under consideration.

Included in these recommendations will be the following:

(a) Clarification and confirmation of FCC jurisdiction over CATV systems generally, along with such specific provisions as are deemed appropriate.

(b) Prohibition of the origination of program or other material by a CATV system with such limitations or exceptions, if any, as are deemed appropriate.

(c) Consideration of whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast

station for the retransmission of the signal by the CATV system.

(d) Consideration of whether CATV systems should or should not be deemed public utilities. In this connection, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The Commission, of course, stands ready to discuss all of the above matters with the appropriate Congressional committees at any time.

Before the
Federal Communications Commission
Washington, D. C.

Amendment of Parts 21, 74
and 91 to adopt rules and
regulations relating to the
distribution of television
broadcast signals by com-
munity antenna television
systems, and related matters.

Docket No. 15971
(RM Nos. 636, 672,
742, 755, and 766)

Before the Commission:

PETITION FOR RECONSIDERATION

Buckeye Cablevision, Inc., (Buckeye), by its attorneys respectfully petitions the Federal Communications Commission for reconsideration of certain portions of the Second Report and Order in Dockets 14895, 15233 and 15971, released March 8, 1966, and published in 31 Fed. Reg. 4540-73 on March 17, 1966 (hereinafter cited Second Report and Order). This petition is filed pursuant to the provisions of Section 1.106 of the Commission's Rules. In support Buckeye shows:

Introduction

1. Buckeye Cablevision, Inc., is an Ohio corporation jointly owned by the Toledo Blade Company (55%) and Cox Cablevision Corporation (45%). It was formed early in 1965. Back on May 17, 1965, Buckeye received a non-exclusive permit from the Toledo City Council, by a vote of 9 to 0, to bring community antenna television (CATV) service to Toledo. It commenced its business operation on that date, and since then other permits have been granted to Buckeye by other communities in the area.

2. Buckeye has invested more than \$500,000 in its system and is committed to the Ohio Bell Telephone Company for additional payments of \$777,000 for installation of coaxial cable plus monthly payments that total over \$5,000,000 during the next ten years. These financial commitments were made based on Commission rules as they existed in May of 1965.

3. The history of the Commission's regulation of television broadcasting reflects its desire to insure that the greatest number of people are able to receive the greatest number of signals. This priority was clearly established in the Sixth Report and Order in 1952, Sixth Report on Television Allocations, 1 RR 91:601(1952), and has been followed ever since. Thus, it was conceivable to Buckeye that, when the new CATV regulations were announced, it would be required to carry all local stations. It was also expected that other stations would have to be carried, such as the educational station in Toledo. In fact, the only requirements that Buckeye could foresee by way of possible Commission regulation would be those that would require Buckeye to carry the greatest number of signals possible. This Buckeye is prepared to do.

4. In recent months the concept was advanced in the trade press and among people in the broadcasting industry that the Commission's new CATV rules should pro-

hibit "leapfrogging" of signals of independent stations over long distances via microwave relays to the exclusion of local independent stations. Buckeye was prepared to avoid this. But when the new rules were finally announced, the Commission proceeded in a completely different manner. Section 74.1107 of the new rules prohibits any CATV system in the 100 largest television markets from extending the signal of any television broadcast station beyond the Grade B contour of that station, unless that signal was being carried as of February 15, 1966.

5. It cannot be considered "leapfrogging", however, when a CATV system wants to carry all stations that it can pick up off-the-air, and not carry any stations located so far away that they can be picked up only by use of microwave relays.

6. As the Commission's new rules would be applied in Toledo, if they are valid, Section 74.1103 of the rules would require Buckeye to carry CKLW-TV, Channel 9, Windsor, Ontario, while under Section 74.1107 it would be prohibited from carrying Channel 50, Detroit, Michigan. Thus, the Commission's rules would require Buckeye to carry a Canadian VHF station and preclude it from carrying a United States UHF station. The rules make no sense in their application in this situation.

7. On March 17, 1966, Buckeye Cablevision offered the following stations on the following channels:

Channel 2	WTOL-TV (11 - Toledo)
Channel 3	WSPD-TV (13 - Toledo)
Channel 4	WWJ-TV (4 - Detroit)
Channel 5	WJBK-TV (2 - Detroit)
Channel 6	WXYZ-TV (7 - Detroit)
Channel 7	WGTE-TV (30 - Toledo)
Channel 8	WKBD-TV (50 - Detroit)
Channel 9	CKLW-TV (9 - Windsor)
Channel 10	WJIM-TV (6 - Lansing)

Channel 30 is the Toledo educational station. When it is not on the air, which it was not during a portion of the day on March 17, 1966, Buckeye presented WJW-TV, Cleveland, Channel 8. When WDHO-TV, Channel 24, Toledo, goes on the air, Buckeye will present its programs on an available channel.

8. It is petitioner's contention that the Commission presently has no jurisdiction to regulate off-the-air CATV systems unless and until the Congress passes enabling legislation by amending the Communications Act of 1934. Nor does Buckeye in any way concede the validity or propriety of the substantive aspects of any of the new CATV rules. Yet, for the purposes of the instant petition for reconsideration, Buckeye will limit its discussion to the following two aspects of the new rules:

- I. The Commission's artificial and unrealistic concept that an off-the-air CATV system must carry all Grade B signals placed over its community, but cannot carry signals of less than Grade B strength even if they can be picked up off the air.
- II. The arbitrary selection of February 15, 1966 as the date after which no television broadcast signals may be extended beyond their Grade B contour unless a CATV system was carrying those signals as of that date.
 - I. The concept of "Grade B contour" should be deleted from the rules, and a provision substituted permitting CATV systems to carry any signals which can be received off-the-air.

9. It is the position of Buckeye that Section 74.1107 of the Commission's rules, precluding a CATV system from carrying a station which does not place a Grade B contour over its community (unless this station was carried as of February 15th), is arbitrary and erroneously conceived. Under Section 74.1103 of the rules, if a station placed a Grade B contour over that community and

there are available channels for its carriage under the Commission's order of priority, then that station must be carried by the CATV system. But if the station places just slightly less than a Grade B contour over the community, then this station cannot be carried.

10. Buckeye suggests that in place of the concept of Grade B contours, a provision should be substituted in Section 74.1107 permitting a CATV system to carry all signals which it can receive off the air, as long as not in conflict with the carriage requirements of Section 74.-1103. The provision suggested by Buckeye is a much more reasonable one, since a station's Grade B contour is only an arbitrary and imprecise estimate of the station's predicted signal strength.

11. An individual Grade B contour is really a variable of the height and power that the particular station can afford. Using this artificial standard to determine which "distant signals" may be imported results in a great unevenness of application. The Commission's Grade B concept assumes that the average Grade B contour of a television station goes out about 60 to 65 miles from the station's transmitter. But in reality reliable signals are available off the air often up to and beyond a distance of 100 miles from a powerful station. Thus the Commission's arbitrary definition would discriminate against lower-power UHF stations that may be closer to a CATV community than a VHF station, but which do not place as strong a signal over the CATV community.

12. The way the rules are presently written, a CATV system has no choice in what signals it carries. Under these rules it must carry every station that puts a Grade B contour over the CATV community. It cannot carry any other signal, even if others are available off the air and capable of being supplied to CATV subscribers without the use of any microwave relays.

13. The Commission could avoid the arbitrary discrimination inherent in its present concept of Grade B

contours by substituting for it a prohibition in Section 74.1107 against importing any signal from a television station that a CATV system is not capable of picking up off-the-air. Except for this change, the same provisions in Section 74.1107 as now exist could be applied to any signal that cannot be picked up off the air without use of any microwave relays.

14. In adopting the change proposed herein, the Commission would give a small degree of flexibility to the CATV operator who serves his community merely by using off-the-air signals. If this change is not made, the new rules would injure new UHF stations, contrary to the Commission's avowed aims, and confer unwarranted financial benefit on the maximum power VHF stations that very well already have achieved financial stability. For instance in Toledo, the new rules require Buckeye to carry two Storer VHF stations, WSPD-TV, Toledo, and WJBK-TV, Detroit. But Buckeye would be prohibited from carrying Detroit's UHF station, WKBD-TV (Channel 50).

15. If an existing CATV system has the capacity to carry all signals which the new rules require to be carried, the Commission should not have an additional rule that would require other available channels to be blacked out, thereby preventing maximum service to the public. The changes suggested by petitioner would permit all of the Commission's goals mentioned in the Second Report and Order to be achieved, and at the same time the public would not be denied the maximum television service it deserves.

II. The effective date chosen for implementing Section 74.1107 violates § 4(c) of the Administrative Procedure Act and should be deleted, and in its place a provision substituted making Section 74.1107 effective and applicable as of April 18, 1966.

16. Paragraph 156 of the Second Report and Order makes Section 74.1107 effective immediately upon pub-

lication in the Federal Register (March 17, 1966). But the rule itself prohibits carriage of any distant television signals not supplied as of February 15, 1966. For all practical purposes the effective date of Section 74.1107 is February 15th. The Commission so concedes.¹

17. The effective date assigned to Section 74.1107 is clearly contrary to the requirement of Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 1003, that new substantive rules may be effective only after thirty days have elapsed since publication of the rule in the Federal Register, except where a showing of "good cause" justifies otherwise. The Commission attempts to show "good cause" for varying from the provisions of Section 4(c),² but this showing is patently inadequate. Not only has the Commission failed to show good cause for making the rule effective immediately upon publication, rather than thirty days thereafter, but the Commission has not given any supporting reasons why it chose to implement the provisions of Section 74.1107 as of February 15, 1966, a full twenty-one days prior to publication in the Federal Register. Without a showing of "good cause", under the terms of the Administrative Procedure Act, Section 74.1107 can neither be effective nor implemented as of a date any sooner than April 18, 1966.

18. Retroactive rules³ are strongly disfavored and may be desirable only in exceptional cases. A common view is that "retroactive rules should be tolerated only when specifically authorized by statute." 1 Davis, Administrative Law 341 (1958) See, e.g., Arizona Grocery

¹ Paragraph 147, Second Report and Order.

² Paragraphs 147-48, Second Report and Order, attempt to rationalize the effective date chosen by the Commission and the arbitrary date upon which "grandfather" rights are pegged.

³ A "retroactive rule" is a rule applied to events occurring prior to the date the rule is first adopted.

Co. v. Atchinson, T. & S.F. Ry., 284 U.S. 370, 389-90 (1932); Litton Industries v. Renegotiation Bd., 298 F.2d 156 (4th Cir. 1962); Blau v. Hodgkinson, 100 F. Supp. 361, 371-72 (S.D.N.Y. 1951). In cases where an agency has adopted a rule specifically implementing a statute previously passed, courts have sustained retroactive application of the rule to the date the statute was enacted. See, e.g., Helvering v. Reynolds, 313 U.S. 428 (1941).

19. Certainly nothing in the Communications Act of 1934, as amended, gives the Commission any specific authority to adopt retroactive rules to regulate CATV systems. This is especially true since the initial question of Commission jurisdiction to issue regulations applicable to CATV systems, which receive their signals off the air, is a subject of bitter controversy and has been committed to the Congress for clarification.⁴

20. Retroactive rule making is disfavored so strongly because of the great inequity caused one whose innocent conduct at that time was not violative of any rule. Courts are quick to point out that the practical application of a retroactive rule creates hardship altogether out of proportion to the public ends to be accomplished. See, e.g., N.L.R.B. v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960), cert. denied 366 U.S. 908 (1961); N.L.R.B. v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952). Courts dislike the lack of uniformity created by the application of rules retroactively. Cloverleaf Dairy Co. v. Benson, 17 A.D. 1084 (N.D. Ill. 1958).

21. The abhorrence to retroactive application of agency rules was expressed by the Congress in enacting

⁴ In H.R. 13286 and S. 3017, 89th Cong., 2d Sess. (1966), the Commission has asked Congress for confirmation of its jurisdiction. and H.R. 12914, 89th Cong., 2d Sess. (1966), introduced by Rep. Walter Rogers, would deny to the Commission jurisdiction "to regulate the reception of radio communications or signals transmitted by any radio station."

the Administrative Procedure Act, 5 U.S.C. §§ 1001-1011. For instance, Section 3(a)(3) of the Administrative Procedure Act requires publication in the Federal Register of substantive rules adopted by every agency. Rule-making actions are subject to the general notice and opportunity-to-be-heard provisions of Sections 4(a) and (b), in addition to the requirement of publication in the Federal Register at least 30 days prior to the rule's effective date.

22. In light of the strong legislative and judicial distaste for retroactive application of agency rules, the Commission's showing of "good cause" for implementing Section 74.1107 immediately upon publication is patently weak and clearly incapable of justifying any departure from the strict requirements of § 4(c) of the Administrative Procedure Act. Nor has the Commission justified its arbitrary choice of February 15, 1966 as the date on which to peg "grandfather" rights.

23. In practical terms, Section 74.1107 has been made effective February 15, but without a showing of "good cause" to support the most severe variance from the requirements of Section 4(c) that has ever been attempted. The Commission's alleged justification in Paragraphs 147-48 of the Second Report and Order is supported only by vague, conclusionary statements, and not by any specific factual allegations. In fact, the first sentence of Paragraph 148 concedes that by acting in its proposed way, the Commission will "take hold of the future" to insure that adequate facts will then be available upon which the Commission or the Congress can make fundamental decisions in the public interest. Such an unreasonable, arbitrary and capricious action cannot be sustained.

24. The argument advanced by the Commission that a line must be drawn someplace, and it might as well be February 15th (the date a routine press release was issued first announcing Commission CATV policy), hardly justifies the substantial hardships created for CATV sys-

tems about to begin operations after undergoing long periods of planning, undertaking large amounts of expenditures, and making binding contractual commitments. Nor can the Commission allege that CATV systems had prior notice of the provisions of Section 74.1107, since the trade press was speculating only that the Commission would seek to prohibit "leapfrogging" of signals of independent stations over long distance via microwave relays, to be carried on a CATV system to the exclusion of local independent signals.

25. Buckeye never anticipated the prohibition in question, nor could it have, since specific rules were issued by the Commission for the first time when it adopted the Second Report and Order. The Commission's April, 1965 "Notice of Inquiry and Notice of Proposed Rule Making,"⁵ however, had led Buckeye to believe that it would be afforded an opportunity to comment on specific rule proposals after a further notice was issued. This opportunity never came.

26. There is nothing to justify the severe departure from customary rules of orderly rule making that has been attempted by the Commission. Interested parties were not given advance notice of the specific language of Section 74.1107, let alone an opportunity to comment on the proposed rule, since this rule was made effective as of the date the Commission's informal press release was first issued. A staggering total of 62 days elapse between the Commission's arbitrary "effective date" of February 15, 1966 and the date specified by the Administrative Procedure Act for the application of new rules, April 18, 1966.

27. In no case where a new agency rule has been given retroactive application has such a severe departure from the thirty day requirement been attempted. For instance, in Hygeia Dairy Co., 17 A.D. 971 (Dept. Agric.

⁵ Regulation of CATV Systems (Docket 15971), 4 RR 2d 1679, 1709 (1965).

1958), a milk marketing order was made effective within less than thirty days after publication. In St. Joseph Stock Yards Co., 6 A.D. 319 (Dept. Agric. 1947), a rate order was made effective two days after issuance, with the warning that the provisions of Section 4 of the Administrative Procedure Act would be fully complied with "except in extremely urgent situations." The Commission previously has found "good cause" to waive the thirty day requirement only because of the critical demands of national security and defense. Reallocation of Frequencies, 17 RR 1587 (1959). And a Securities and Exchange Commission rule was similarly made effective upon issuance in Commonwealth & Southern Corp. (Delaware), 28 S.E.C. 776 (1948). But these departures from the strict requirements of Section 4(c) are rare.

28. Here the Commission has failed to show that the public interest would suffer irreparable injury unless the Commission's prohibition against the importation of distant signals was applied effective February 15, 1966. The Commission has not made a compelling demonstration that only in the manner chosen by the Commission can its CATV policy be effectively adopted, or that the public interest demands that the new rule be imposed with such drastic retroactive effect.⁶ The Commission's unsupported allegation is simply that "we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action." Second Report and Order, Paragraph 147. Such an unreasonable assertion of authority cannot be sustained, especially when its effect will be to cut back and deny service to the public.

29. Petitioner alleges "good cause" for not previously participating in the instant proceeding. It had no way of anticipating that the Commission would choose such an artificial concept as the Grade B contour for judging

⁶ See, e.g., E & B Brewing Co., *supra*, 276 F.2d at 600.

which signals the Commission would prohibit a CATV system from carrying, where a CATV system would then be denied the opportunity to carry other stations that it could pick up off the air and carry on its remaining available channels. Nor could petitioner anticipate that the effective date chosen by the Commission to implement Section 74.1107 would flagrantly violate the strict requirements of the Administrative Procedure Act. Thus, petitioner has complied with Section 1.106 of the Commission's Rules governing petitions for reconsideration.

30. In conclusion, petitioner requests that the Commission reconsider its action adopting these new rules, and incorporate into its rules the provisions requested herein.

Respectfully submitted,

Buckeye Cablevision, Inc.

March 25, 1966

/s/ Robert A. Marmet (PLK)

/s/ Peter L. Koff

/s/ William P. Sims, Jr. (PLK)

Its Attorneys

Certificate of Service 25th day of March 1966

⁷ The House Commerce Committee previously had been advised that the Commission did not have jurisdiction over off-the-air CATV systems.

**PETITION OF BUCKEYE CABLEVISION, INC.
FOR DECLARATORY RULING, FOR WAIVER
OR OTHER APPROPRIATE RELIEF**

This Petition is submitted on behalf of Buckeye Cable vision, Inc. (Buckeye) and requests the following relief:

(1) A declaratory ruling, pursuant to Section 5(d) of the Administrative Procedure Act and Section 1.2 of the Commission's Rules and Regulations confirming that Buckeye's CATV operations in Toledo, Ohio, as described below, conform to all valid Federal regulations; or

(2) In the alternative, for a waiver of any rules or regulations necessary for such operations and program distribution; and

(3) For immediate consideration and action on this petition; and

(4) For oral argument, unless the relief prayed for alternatively in (1) and (2) above is promptly and expeditiously granted.

Preliminary Statement

1. A brief preliminary statement of purpose and position is in order. Buckeye is in substantial disagreement with the Commission's assumption of jurisdiction over off-the-air CATV systems without enabling legislation and Congressional guidelines, with certain substantive and procedural aspects of the new Rules adopted by the Commission's Second Report and Order (31 Fed. Reg. 4540-73, March 17, 1966), and with the legal sufficiency of certain attempted effective dates and notice provisions; however, these general legal and policy questions continue subject to appropriate petitions for rehearing or reconsideration, court proceedings and the current Congressional review. Buckeye, concurrently and by separate pleading, is petitioning for reconsideration of the Commission's Second Report and Order and

urges timely consideration and grant of the relief requested therein. This Petition requests more limited relief within the framework of, and assumes arguendo the validity of substantive provisions of, the new CATV Rules, but it is without prejudice to any position which Buckeye may take in any other pleading or proceeding as to the Commission's jurisdiction, the Rules adopted by the Second Report and Order, or the legal sufficiency of certain effective dates and notice provisions.

2. As outlined below, the formulation of Buckeye's Toledo CATV project commenced in 1964, and continued in due course in 1965 and 1966 with enabling ordinances and permits from the City of Toledo and surrounding communities, contracts and substantial payments to Ohio Bell Telephone Company, the purchase and delivery of equipment and the hiring and training of personnel. Buckeye has invested more than \$500,000.00 in its CATV system and is committed to Ohio Bell for additional payments of \$777,000.00 for installation of coaxial cable plus monthly payments which total over \$5.0 million during the next 10 years. Buckeye is currently providing to its subscribers the programming of all of the television stations which place a predicted Grade B or better signal over Toledo, plus WKBD-TV, Channel 50, Detroit and WJIM-TV, Channel 6, Lansing, Michigan, both of whose Grade B contours fall a few miles north of the city limits of Toledo and whose signals are available on rooftop antennas in certain areas of Toledo. The implementation of the Toledo CATV system, insofar as the delivery of the WKBD-TV and WJIM-TV signals to subscribers, occurred after February 15, 1966 and prior to the publication of the Commission's new CATV Rules in the Federal Register.

3. Buckeye then is met with the situation where the Commission, upon the basis of a Notice of Inquiry and without proposed rules, attempts in substance to make rules effective by ordinary press release on February

15, 1966,¹ 30 days before publication in the Federal Register and 60 days before such Rules can normally become effective under the Administrative Procedure Act — which provisions in toto clearly jeopardize a multi-million investment and a legitimate business enterprise in development since 1964. The current operations of Buckeye as described in this Petition is the minimum type of service which Buckeye can render without substantial and irreparable injury. Buckeye has no feasible alternative to its present course in the face of what it clearly deems unlawful, arbitrary and capricious administrative action, pending judicial determination, if necessary, of its rights. However, pending the determination of the broader policy and legal questions by legislative, judicial or administrative action, and in an effort to limit this controversy, the essential purpose of this request is to confirm the validity, or obtain waivers if deemed necessary by the Commission, covering the current limited operations of Buckeye relating to the carriage of all Grade B signals plus Channel 50 from Detroit and Channel 6 from Lansing. Such relief is clearly justified on the basis of equitable and public interest considerations.

¹ The Commission's Public Notice of March 8, 1966 (Public Notice G, Mimeo 80850) stated "Effective upon publication in the Federal Register, which is to be on March 17, 1966, no CATV system located within the predicted Grade A contour of a TV station in the 100 largest TV markets * * * shall provide new service to subscribers which would extend the signal of any TV station beyond its Grade B contour * * *." This March 17 date was widely reported in the trade press as the effective date of the prohibition against carriage of "distant signals". Buckeye respectfully submits that, if the Commission is going to effect rules or establish rights by press releases, it at least has the duty to inform potentially interested parties accurately by such press releases.

**History, Development and
Description of Toledo CATV System**

4. Discussions among principals looking toward the organization of Buckeye and the development of the Toledo CATV system commenced in August or September 1964. Management and legal preparations continued throughout late 1964 and 1965 to the point that Buckeye was organized early in March 1965. Following public hearings in March, April and May, 1965, the City of Toledo, by unanimous 9 to 0 vote, adopted enabling and permit ordinances on May 17, 1965 for the proposed Buckeye CATV system. In the public hearings, these ordinances were opposed in Toledo essentially by the same parties (Woodruff, Inc., D. H. Overmyer, Storer Broadcasting and TAME) who subsequently have attempted to forestall the development of the Toledo CATV system in pleadings filed with the Commission, and largely on the same grounds. Subsequent permits were obtained from the suburban communities of Sylvania (July 19, 1965), Maumee (September 20, 1965) and Perrysburg (February 8, 1966).

5. Commencing in July 1965 and continuing in due course throughout the latter half of 1965 and early 1966, Buckeye contracted with Ohio Bell for the construction of a CATV system to cover the Greater Toledo area, made substantial payments to Ohio Bell in connection therewith, purchased and accepted delivery of equipment leased office facilities, employed and trained personnel and implemented the foregoing business plans and operations by instituting delivery of service to subscribers. To this point, Buckeye has invested more than \$500,000.00 in this CATV system, is committed to Ohio Bell for additional payment of \$777,000.00 for installation of coaxial cable plus monthly payments that total over \$5.0 million during the next 10 years. It has additional commitments under leases and for the employment and welfare of the Buckeye staff.

6. Currently, Buckeye is offering the following stations on the following channels:

Channel 2	WTOL-TV (11 - Toledo)
Channel 3	WSPD-TV (13 - Toledo)
Channel 4	WWJ-TV (4 - Detroit)
Channel 5	WJBK-TV (2 - Detroit)
Channel 6	WXYZ-TV (7 - Detroit)
Channel 7	WGTE-TV (30 - Toledo) ²
Channel 8	WKBD-TV (50 - Detroit)
Channel 9	CKLW-TV (9 - Windsor)
Channel 10	WJIM-TV (6 - Lansing)

When Station WDHO-TV, Channel 24, Toledo goes on the air, Buckeye will of course present its programs on an available channel. Buckeye's operations will also conform to applicable programming non-duplication requirements.

7. The Commission has assured members of the House Interstate and Foreign Commerce Committee that equitable considerations of in-progress CATV systems will be taken into account. (Report of Proceedings of Committee on Interstate and Foreign Commerce, March 23, 1966, pp. 167-69, 181-83.)

Comments on Notice Provisions and Attempted Effective Dates for New CATV Rules

8. Buckeye's companion Petition for Reconsideration urges that the notice provisions and effective dates relating to the new CATV Rules are unlawful and in violation of Section 4(c) of the Administrative Procedure Act. The detailed legal arguments and precedents cited in

² Channel 30 is the Toledo educational station. Buckeye has carried one of the Cleveland channels during the time when WGTE-TV was not operating; however, this has been suspended for technical and other reasons and the carriage of such Cleveland station is not a part of this request for interim relief.

such Petition for Reconsideration, and which are incorporated herein by reference, need not be repeated in full here. However, Buckeye does submit that the highly controversial, questionable and extraordinary implementation of the Commission's Second Report and Order are additional considerations warranting approval of the interim relief requested in this Petition.

9. Briefly, the questions presented here were subject, prior to the adoption of the Commission's Second Report and Order, only to the Notice of Inquiry portion of the Notice adopted in Docket 15971 on April 22, 1965 (FCC 65-334). The unhappy (and we submit legally unsustainable) chain of events can correctly be summarized as follows:

(a) The Commission on April 22, 1965 instituted an inquiry pursuant to Section 403 of the Communications Act into such matters as "leap-frogging", effect of CATV on development of independent UHF stations into large markets, extension of television station signals, etc. In so doing, the Commission stated:

"64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. * * * The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. * * * We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be

issued to afford an opportunity for comment on the specific rule proposals of the Commission.

"68. After study of the comments, the Commission may, by subsequent Order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited, and an appropriate Order specifying the nature and time may be issued at a later date." (Emphasis supplied.)

(b) Without any Notice of Proposed Rule Making and specific proposed rules, and without affording the interested parties any opportunity for oral argument, the Commission next attempted to adopt specific rules, to become effective insofar as in-progress CATV systems are concerned, by ordinary press release and substantially in advance of adoption of the Second Report and Order, publication in the Federal Register and the general effective date of the Rules 30 days after publication in the Federal Register as required by the Administrative Procedure Act. The Commission's press releases were even conflicting and confusing — the Public Notice of March 8, 1966 clearly stated and was reported widely in the trade press to the effect that CATV systems within the ambit of the top 100 markets could not without FCC approval commence carriage of "distant signals" after publication in the Federal Register on March 17, 1966.

(c) In attempting to justify its extraordinary procedures, the Commission reports the continuing interest and growth of both UHF and CATV in major markets side by side, but claims that extraordinary procedures have to be adopted and made effective by press release to shackle the one to insure the continued welfare of the other. At the same time the Commission recognizes that there is no evidence that UHF stations have gone out of business because of being adversely affected by

CATV,³ and the Commission's records reflect that a number of UHF licensees or permittees have endorsed CATV in their markets.

10. It is also pertinent to re-emphasize that the Commission has followed a very uncertain course as to its jurisdiction over off-the-air CATV systems, that the Commission is still seeking legislative confirmation and clarification of its alleged jurisdiction, that there is public dispute between the Commission and important members of Congress as to whether or not the Commission was committed to further consultation with the Congress prior to adopting rules, and that the Commission has adopted some highly extraordinary rules and procedures. Consequently, it is inaccurate and unfair for the Commission to claim that interested parties were given full and adequate notice, and Buckeye submits that such course of administrative conduct is not legally sustainable.

11. Buckeye therefore submits that the foregoing events and the extraordinary conduct thereof by the Commission provides an additional equitable basis for the grant of the limited relief requested herein.

Additional Public Interest Considerations

12. The City of Toledo, by the unanimous vote of its City Council, has determined that the public interest would be served and that there is need for Buckeye's CATV system in Toledo. This action was taken after hearing essentially the same parties and objections now before the Commission.

13. Pending the final determination of the Commission's jurisdiction and the scope of its CATV regulations

³ Report of Proceedings Before the Committee on Interstate and Foreign Commerce, March 23, 1966, p. 164.

in appropriate administrative, judicial or legislative proceedings, Buckeye is clearly operating, under any interpretation, in substantial compliance with the new CATV Rules adopted by the Second Report and Order. Buckeye is currently carrying, subject to applicable non-duplication requirements, the signals of all of the television stations which provide a predicted Grade B signal to Toledo — plus Channel 50 in Detroit and Channel 6 in Lansing. The extent of the controversy, then, relates to the carriage of two signals just slightly beyond their Grade B contours.

14. Under the Commission's new CATV Rules, Buckeye is required to carry all of the Detroit area stations, including one foreign station in Windsor, except the Detroit UHF station — WKBD-TV, Channel 50. Because of the somewhat more limited coverage of UHF, the predicted Grade B contour of Channel 50 falls approximately three miles north of the city limits of Toledo.⁴ Thus, the strict application of the Commission's Rules could potentially require Buckeye to carry two Storer-owned stations, one Canadian station, all of the Detroit-Windsor VHF station — but not the Detroit UHF station. This is a patently ridiculous result and a compelling case for a rule change, exception or waiver.

15. Likewise, the predicted Grade B contour of Station WJIM-TV, Channel 6, Lansing, falls approximately 7-8 miles north of Toledo. The signal is available in Toledo on many standard rooftop antennas.

16. The carriage of these two signals slightly beyond their predicted Grade B contours hardly represents any "leap-frogging" of far-distant signals which the Commission primarily wants to subject to further proceedings and study — but, at the same time, the current op-

⁴ Station WKBD-TV could probably establish a translator on the northern outskirts of Toledo and require carriage of such translator.

erations represent the minimum alternative to avoid substantial and irreparable injury to Buckeye. Subjecting such possible exception to lengthy evidentiary hearings, for which the Commission is currently unprepared and understaffed, is a wholly inadequate remedy.

17. Effect on UHF. Insofar as the impact of the Buckeye CATV operations on UHF, the following considerations clearly warrant the grant of the relief requested herein:

(a) Buckeye intends to carry the programs of WDHO-TV, Channel 24, Toledo when that station goes on the air, and the same is true of any other potential UHF operation in Toledo. Such UHF stations will be accorded any programming non-duplication protection to which they are entitled by applicable regulation, and Buckeye's CATV system will materially assist such UHF operations to the extent of delivering their programs to subscribers' homes not otherwise equipped to receive UHF.⁵

(b) The D. H. Overmyer station in Toledo (WDHO-TV, Channel 24) has been in the process of construction with full knowledge of the Toledo CATV franchise and the Buckeye CATV plans. Under such circumstances, it can hardly be alleged despite any protestation to the contrary that the WDHO-TV operations are contingent on Buckeye's current CATV operations.

(c) Rust Craft Broadcasting Company filed its pending application for Channel 54 in Toledo late in 1965, presumably with substantially full knowledge of CATV developments in Toledo. Rust Craft is also a major CATV operator, and according to press reports is con-

⁵ A substantial number of UHF licensees or applicants have announced that they favor CATV in their markets, including UHF stations or permittees, in Cleveland, San Diego, Huntsville, Alabama, and Walla Walla, Washington.

tinuing to develop and operate CATV systems in one or more of the top 100 markets.⁶

(d) There is no probative evidence that CATV in Toledo will adversely affect UHF development in that City. The Commission recognizes that the City of Toledo, as stated before, has found a public need for CATV in Toledo after public hearings and full consideration, and that there is a substantial interest in and public demand for a wide choice of television programs.

18. In addition to Overmyer and Rust Craft, several other parties have currently or in the past importuned the Commission by letters or pleadings to take some action or to forestall the development of the Buckeye CATV project in Toledo. This includes Storer Broadcasting Company, multiple television station owner and CATV operator, including Television Stations WSPD-TV, Toledo and WJBK-TV, Detroit. Buckeye disputes Storer having any legitimate interest or basis for protest, except that the application of the Commission's new CATV Rules in this controversy does highlight Storer's extreme duopoly situation in Detroit-Toledo. We recognize that the strict application of the Commission's Rules would currently give Storer two of seven rather than two of nine channels on the Buckeye CATV system.

19. Petitions or letters have also been filed with the Commission by Woodruff, Inc. and by three individuals (Margaret S. Garretson, Lawrence Knannlein and Gordon Foster III) who have brought a taxpayer's suit in Toledo in connection with the issuance of CATV ordinances. Woodruff, Inc. is owned by Edward Lamb and, according to depositions taken in the Toledo taxpayer's suit, the three individuals filing the taxpayer's suit and the petition to the Commission are employees of Edward Lamb. Edward Lamb Enterprises does not oppose

⁶ Barron's, March 21, 1966, p. 9.

CATV in Toledo — instead, the Lamb interests by public statements and litigation have made various allegations that the City of Toledo, Ohio Bell, Buckeye and Buckeye's stockholders have forestalled Lamb's CATV project in Toledo.

20. Pay-TV Issue. In the event that the pay-TV issue has any materiality, Buckeye hereby confirms that it has no present plans to provide any programs to its Toledo subscribers on a per-program basis. Buckeye believes that the potential of pay-TV developing from CATV is highly unlikely and a much-exaggerated claim in the present CATV controversy — and absent presently unforeseen developments which long range might render such pay-TV operations appropriate in the determination of the Congress and/or Commission, Buckeye's CATV system in Toledo will not distribute programs on a per-program charge basis.

Procedural Matters

21. Pursuant to Section 74.1109(b), this Petition is being served on all of the television stations carried by Buckeye's CATV system, on Toledo UHF applicants or permittees, and on the Edward Lamb interests.

22. Acceptance of service is acknowledged by the undersigned counsel for Cosmos Broadcasting Corporation, licensee of Television Station WTOL-TV, Toledo.

23. An affidavit of Marcus Bartlett, a Vice President of Buckeye, verifying the factual data herein is attached.

Conclusion

24. This Petition seeks legal sanction by declaratory order or waiver, if necessary, for the current CATV operations of Buckeye which program and distribute, subject to applicable non-duplication requirements, television programs of all Toledo commercial and educational stations (including new UHF stations when activated), the Detroit-Windsor television stations and Tele-

vision Station WJIM-TV, Lansing, Michigan. Buckeye respectfully submits that such operations fully conform to the general purposes and objectives of the Commission's new CATV regulations. To the extent that there is a dispute with respect to the carriage of Channel 50, Detroit, and Channel 6, Lansing, this issue should be resolved in favor of Buckeye on the basis of the equitable and public interest considerations detailed in this request. The grant of the requested relief will provide a reasonable basis for interim and continued operations pending the longer-range determination of the Commission's CATV jurisdiction and rules in appropriate administrative, judicial or legislative proceedings.

Respectfully submitted,
BUCKEYE CABLEVISION, INC.

/s/ Wm. P. Sims, Jr.
/s/ Robert A. Marmet

March 25, 1966

Its Attorneys

AFFIDAVIT

DISTRICT OF COLUMBIA, ss

MARCUS BARTLETT, having been duly sworn, deposes and says:

(1) That he is a Vice President of Buckeye Cablevision, Inc.; and

(2) That the facts and data included in the associated petition filed pursuant to FCC Rule 74.1109 have been prepared by him or assembled under his direction, and that such facts and information are true and correct of his personal knowledge and belief.

/s/ Marcus Bartlett

[Jurat and Certificate of Service dated Mar. 25, 1966]

Buckeye Cablevision, Inc.

[1]

FCC 66-273

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
CEASE AND DESIST ORDER TO BE DIRECTED
AGAINST BUCKEYE CABLEVISION, INC., } Docket No. 16551
OWNER AND OPERATOR OF A COMMUNITY
ANTENNA TELEVISION SYSTEM AT TOLEDO,
OHIO }

ORDER TO SHOW CAUSE

(Adopted March 25, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING
A STATEMENT; COMMISSIONERS LOEVINGER AND WADSWORTH ABSENT.

1. The Commission has under consideration the issuance of an order directed to Buckeye Cablevision, Inc., owner and operator of a community antenna television system (CATV) at Toledo, Ohio, to cease and desist from operations in violation of section 74.1107 of the Commission's rules promulgated under the Communications Act of 1934, as amended. On March 21, 1966, the Commission by telegram requested information from Buckeye concerning its operation and inquiring whether it would voluntarily cease any violation of the rules of the Commission. In its reply, Buckeye has acknowledged that it began transmitting the signals of two television stations beyond their grade B contours after February 15, 1966. Buckeye asks that the Commission take no action until its petitions and pleadings, to be filed on March 25, 1966, have been studied. We note that such documents can be considered by the Commission at the time of the hearing ordered herein.

2. The relevant facts are as follows: On May 17, 1965, the Council of the city of Toledo adopted an ordinance granting to Buckeye the nonexclusive right for a period of 20 years to construct and operate a CATV system in that city. The construction of the system being near completion, the system commenced operation in part of Toledo on March 16, 1966. The system is a community antenna television system as defined in section 74.1101 of the Commission's rules, 31 F.R. 4569. The system makes available to its subscribers the off-the-air signals of television stations WTOL-TV, WSPD-TV, and WGTE (a noncommercial educational station) of Toledo, Ohio; WJBK-TV, WWJ-TV, and WXYZ-TV of Detroit, Mich., and CKLW-TV, Windsor, Ontario, each of which provides a predicted signal strength of grade B or better to the city of Toledo. The system also makes

available the signals of television stations WKBD-TV, Detroit, Mich., and WJIM-TV, Lansing, Mich., which do not provide any portion of Toledo with a predicted grade B signal. The system also transmits weather and time reports. Toledo is ranked as the 26th "television market" by the rating of the American Research Bureau, on the basis of the net weekly circulation for 1965. Toledo is within the predicted grade A contours of the following Toledo television stations: stations WTOL-TV, WSPD-TV, and WGTE-TV.

3. On March 8, 1966, the Commission adopted rules for the regulation of all CATV systems. The rules are set forth in the Commission's second report and order in dockets Nos. 14895, 15233, and 15971 (FCC 66-220, 2 FCC 2d —), which was published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107 of the rules sets forth certain requirements and procedures for CATV systems operating in the 100 highest ranked television markets as determined by the American Research Bureau net weekly circulation figures for the most recent year, and provides, in substance, insofar as pertinent here, that effective upon publication in the Federal Register (Mar. 17, 1966) no CATV system commencing operation after February 15, 1966, and located within the predicted grade A contour of a television station in one of the 100 largest television markets, shall provide service to subscribers which would extend the signal of any television station beyond its predicted grade B contour, except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension of the signal would be consistent with the public interest. The request for an evidentiary hearing is to be made by the CATV system and shall contain the information specified in the rule.¹

4. Buckeye has not made the request for an evidentiary hearing required by section 74.1107 of the rules and has otherwise failed to comply with the provisions of that section. Buckeye will therefore be directed to show cause why it should not be ordered to cease and desist from continuing to operate its CATV system in violation of the requirements of section 74.1107.

5. In the second report and order we indicated that we would take action expeditiously in the event of a violation of section 74.1107 of the rules. We acknowledged "the very great desirability" of avoiding the disruption of CATV service to the public which would result from action applicable to an operating CATV system. Clearly, time is of the essence here.² This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening the rules. The public interest requires that

¹ On Feb. 15, 1966, the Commission had issued a public notice (No. 79927) announcing its intention to regulate CATV systems. The Commission announced that it was asserting jurisdiction over all CATV systems, whether or not served by microwave relay, and that parties obtaining State or local franchises to operate CATV systems in the 100 highest ranked television markets, where the system would extend the signals of television broadcast stations beyond their predicted grade B contours, would be required to obtain Commission approval before such CATV service to subscribers could be commenced. It was announced at that time that an evidentiary hearing would be held as to all such requests for Commission approval, subject to the general waiver provisions of the Commission's rules. Notice was given that this aspect of the Commission's regulatory program would be applicable to all CATV operation commenced after Feb. 15, 1966.

² A Toledo newspaper, The Blade, for Mar. 15, 1966, stated in part: "Although CATV service is currently limited to the one operational area, Mr. Hoarty [system manager] said that Ohio Bell crews already are at work engineering and wiring other sections of the Toledo metropolitan area. Service will be available to residents in those areas as work is completed."

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[3]

insofar as possible the situation in Toledo should not be permitted to worsen. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably require that the examiner certify the record, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within 7 calendar days after the date the record is closed. We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rule.

6. *It is ordered*, This 25th day of March 1966, that pursuant to section 312 (b) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. 312 (b) and (c), Buckeye Cablevision, Inc., is *Directed to show cause* why it should not be ordered to cease and desist from further operation of a CATV system in Toledo, Ohio, which extends the signals of television stations beyond their grade B contour in violation of section 74.1107 of the Commission's rules; and that Buckeye Cablevision, Inc., is directed to appear and give evidence with respect to the matters recited above at a hearing, unless the hearing is waived, in which event a written statement may be submitted, to be held at Washington, D.C., on April 28, 1966, before an examiner to be specified by subsequent order.

7. *It is further ordered*, That upon the closing of the record it shall be certified immediately to the Commission for final decision; and that the parties hereto shall file proposed findings of fact and conclusions of law within 7 days after the date the record is closed.

8. *It is further ordered*, That the Secretary of the Commission send copies of the order by certified mail—return receipt requested to Buckeye Cablevision, Inc.

[4]

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent to issuance of the show cause order. I would defer consideration, as requested by the respondent, until the filing by March 25 of its petition in this matter, so that we might have before us a more adequate basis for determining whether action is warranted.

It appears from the information now before us that the system is not in contravention of our rules since operation was begun on March 16 and our pertinent rule was not to become effective until publication in the Federal Register on March 17.

[17]

**PETITION TO CLARIFY OR ENLARGE
ISSUES AND MOTION THAT PETITION
BE CERTIFIED TO THE COMMISSION**

(To be acted upon initially by the Review Board)

Buckeye Cablevision, Inc. (Buckeye), by its attorneys, respectfully requests that the issues in this proceeding be clarified or enlarged in the manner set forth in this petition. In addition, for reasons which will be set forth at the outset of this petition, it is respectfully suggested that the Review Board certify the questions raised by this petition to the Commission, pursuant to the provisions of Section 0.361(b) of the Commission's Rules. The following is submitted in support of this request:

**A. Procedural matters and motion for
certification to the Commission.**

1. This case concerns an order issued by the Commission on March 25, 1966 (FCC 66-273, 81034), directing Buckeye to show cause why

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it should not be ordered to cease and desist from continuing to operate its CATV system in Toledo, Ohio, in violation of the requirements of Section 74.1107 of the Commission's Rules. This section of the Rules is one of the many new regulations adopted by the Commission on March 4, 1966,¹ in an effort to extend its jurisdiction over important aspects of the CATV industry. This case represents the Commission's first attempt to enforce these new rules by means of a cease and desist proceeding pursuant to the terms of Section 312(b) of the Communications Act.

2. This motion to clarify or enlarge issues is filed pursuant to the provisions of Section 1.229 of the Commission's Rules,² Section 312 of the Communications

Act and Sections 5 and 7 of the Administrative Procedure Act. Under the provisions of Section 0.365(b)(1) of the Rules, action upon petitions to enlarge issues is delegated to the Review Board. Section 0.361(b) provides that matters referred to the Review Board on a regular basis may, on its own motion or on the motion of a party be certified by the Board to the Commission with Commission consent, if in the Board's judgment the matters at issue are of such a nature as to

1/ Released March 8, 1966, published in the Federal Register March 17, 1966 (31 F.R. 4540).

2/ Section 1.229 requires that a motion to enlarge issues must be filed within 15 days after the issues have first been published in the Federal Register. The hearing order in this case has not yet been published in the Federal Register.

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warrant Commission review.

3. Extensive documentation is not required to demonstrate that the Commission's new rules concerning CATV regulation have generated substantial controversy and litigation. The Congress of the United States currently has the question of CATV regulation under serious and active consideration. Statutory appeals have already been filed with the United States Court of Appeals for the District of Columbia Circuit. The process of administrative review of the new CATV rules in general, and their application to Buckeye in particular, is not yet complete. In fact, on March 25, 1966, the same day that the order to show cause in this case was issued Buckeye filed two pleadings with the Commission: (1) Petition of Buckeye Cablevision, Inc. for Declaratory Ruling, for Waiver or Other Appropriate Relief, and (2) Petition for Reconsideration. In addition, Buckeye is

filing pleadings on this date,^{3/} addressed to appropriate forums of the Commission,^{3/} requesting various forms of relief in connection with this cease and desist proceeding.

4. The rules concerning delegation of authority require that some

3/ A Petition for Continuance, addressed to the Chief Hearing Examiner, and a Petition for Consolidation and Reconsideration, addressed to the Commission.

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of these petitions be addressed to the Review Board and the Hearing Examiner.^{4/} It appears clear, however, that all of these pleadings should be acted upon by the Commission at one time. Questions of continuance, reconsideration and consolidation are all closely related. For example, if the Commission should consolidate Buckeye's request for a waiver of the rules with this cease and desist proceeding, the issues in the case would automatically be enlarged to include matters relevant to the waiver request. In addition, as will be seen below, there is little guidance or precedent available in Commission decisions concerning the scope of a cease and desist proceeding. Consequently, because this case deals with new rules still subject to Commission reconsideration, because related pleadings addressed to the Commission and the Hearing Examiner could affect a decision upon this motion to enlarge issues, and because of the lack of Commission policy and precedent concerning the scope of the issues in a cease and desist case, it is respectfully requested that the Review Board certify this petition to the Commission for decision.

B. The petition to clarify or enlarge issues.

4/ In fact, if all requests were combined in one pleading addressed to the Commission, which would be

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desirable in the interest of simplicity, Buckeye would hazard the risk that the pleading would be returned without consideration (See Section 1.44(d) of the Rules).

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1. Preliminary statement, relief requested, and incorporation by reference.

5. At the outset of this request, Buckeye deems it advisable to state briefly its position concerning the required scope of this cease and desist proceeding, and to contrast this position with the very restrictive approach which the Commission has apparently taken in its Order to Show Cause in this case.

6. Although the Commission has not stated specifically the issues which shall control the course of this proceeding, it appears from the Order to Show Cause that the Commission considers this to be a very simple case dealing with one single issue of fact.^{5/} Thus, in paragraph 5 of the order, the Commission established a very abbreviated time schedule for the hearing and for the filing of proposed findings of fact and conclusions of law. Commenting upon this schedule, the Commission stated:

"We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rule."

7. For reasons which will be more fully developed below,

^{5/} Actually, although the Commission appears to consider this case as dealing with one single issue, there is a very substantial ambiguity in the Order to Show Cause. The order states that the Commission can consider Buckeye's waiver request at the time of this hearing. This would, of course, require

a more complex hearing. Buckeye has asked the Commission for clarification of this ambiguity in its Petition for Reconsideration and Consolidation filed this date.

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Buckeye submits that due process of law requires that a hearing of this nature must have a far greater scope if the Commission is to determine whether the public interest will be served by directing Buckeye to cease and desist from carrying two "distant signals" on its Toledo CATV system.^{6/} Implementation of the Commission's rules to require that Buckeye terminate a vital portion of its CATV service, currently being furnished pursuant to a valuable franchise validly issued by the City of Toledo is, beyond question, a taking and confiscation of a valuable property right. If the hearing required by Section 312(c) of the Act is to have any meaning — if it is to be anything but a mockery — it must be a full adjudicatory evidentiary hearing conducted in accordance with due process of law. The hearing must permit and require full exploration of the public interest in application of these untested rules to the respondent and the extent of Buckeye's private interest which the Commission seeks to terminate and confiscate. This hearing must permit,

^{6/} So that there may never be any question of possible waiver in the future, Buckeye wishes to make it clear that the filing of this request to clarify and enlarge issues is not a waiver of its right to introduce evidence at any hearing concerning the matters and questions covered in this request. Regardless of what action the Commission may take on this request, Buckeye intends to offer evidence on these questions in any administrative hearing or court trial on the cease and desist question.

at a minimum, exploration of the following issues:

a. Whether the Commission has jurisdiction to adopt regulations for CATV systems which do not require microwave authorization.^{7/}

b. Assuming that the Commission has such jurisdiction, whether the factual predicates set forth in the Second Report and Order are based upon substantial evidence; and, if so, whether the public interest will be served by the objectives set forth in the Second Report and Order; and, if so, whether the rules adopted in the Second Report and Order may be reasonably expected to foster or hinder the Commission's objectives as set forth therein.

c. Assuming that the Commission's new CATV rules have been legally adopted, whether circumstances in the Toledo area require that these rules be^{8/} waived with respect to the Buckeye CATV operation.

d. Whether the application of the new CATV rules to Buckeye, and particularly the retroactive application of these rules to Buckeye

^{7/} Space does not permit full exposition of the jurisdictional problems raised by these new rules. The questions basically concern constitutionality and the Commission's powers under the Communications Act, and are presently pending before the Commission and the Courts. See also, Weaver v. Jordan, California Supreme Court, March 2, 1966. It is, of course, manifest that the Commission may not enforce an unlawful rule.

^{8/} Buckeye's Petition for Waiver of these Rules, filed March 25, 1966, is incorporated by reference herein (see paragraph 9, infra).

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(purportedly accomplished by a press release dated February 15, 1966), is an unconstitutional taking of property without due process of law.^{9/}

e. Whether circumstances exist in the Toledo area which imperatively and unavoidably require that the Commission enforce its prohibition against carrying distant signals by a cease and desist proceeding at a time when the entire question of CATV regulation is still subject to administrative, congressional and judicial review.

f. As a corollary of the foregoing issue, whether Buckeye will be irreparably injured by an order to cease and desist from carrying distant signals, and whether there will be any injury to Buckeye's subscribers or to the interest of the public if Buckeye is allowed to carry such signals pending resolution of the questions raised in such review.^{10/}

g. Whether operation of the Buckeye CATV system in the Toledo area would, in fact, discourage or have any adverse impact upon

^{9/} Buckeye's Petition for Reconsideration, filed on March 25, 1966, discussing in detail the problem of retroactive application of these rules, is incorporated by reference herein (see paragraph 9, *infra*).

^{10/} The only apparent reason for the Commission's haste in prosecuting this case is protection of Buckeye's customers. If they are able to cancel service without financial loss in the event that carriage of distant signals should finally be prohibited, it would seem that there is no possibility of injury. They will merely have enjoyed the service for a little extra time.

the development of additional television broadcast service in the Toledo area, in light of evidence to be adduced concerning:

1. The economic resources available to support commercial television broadcast stations in the area.

2. The economic resources available to support educational television broadcast stations in the area.

3. The impact which CATV systems have had upon television broadcast stations in other markets.

4. The maximum number of subscribers which the Buckeye CATV system may reasonably expect to attract in relation to the total homes reached by a television broadcast station within the station's service area.

- h. Whether the interest of the Toledo public in selection among a wide variety of television programs and in a high technical signal quality outweighs any possible dangers to development of additional television broadcast stations in the area.

- i. Whether operation of the Buckeye system will contribute to the development of educational telecasting, particularly in the UHF band, in Toledo.

- j. Whether a CATV system in Toledo which is prohibited from carrying distant signals may reasonably be expected to succeed economically,

and, if not, whether the public interest is served by depriving the Toledo public of the opportunity to subscribe to a CATV service and make a selection of programming from a maximum number of television services.

- k. As a corollary to the above issue, an issue should be added to determine the availability of television

broadcast service in Toledo which may normally be received (1) without CATV and (2) without roof-top antennas. This issue should also require inquiry into the nature, availability, and audience acceptance of existing live programming designed to serve the Toledo area. It should also permit a showing of the nature and quality of the programming which Buckeye can bring into the Toledo area from distant stations.

1. Whether, in light of the evidence adduced pursuant to the foregoing issues, the public interest would be served by directing Buckeye to cease and desist from carrying distant signals.

8. The burden of proof on these issues (except with respect to those matters peculiarly within the control or knowledge of Buckeye) would, of course, be upon the Commission under the terms of Section 312(d) of the Communications Act. Specification of such issues would however, allow Buckeye to introduce extensive evidence relevant to the public interest, including (though not limited to) the following:

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a. The need and demand of the citizens of Toledo and environs for multiple television services which can only be provided by a CATV system which carries "distant signals", and testimony concerning quality of signal available to Buckeye's subscribers, particularly with reference to color reception.

b. The basis upon which the duly elected representatives of the citizens of Toledo and environs decided that the public interest required a grant to Buckeye for a CATV system which would carry distant signals.

c. The investment and commitments which Buckeye has made which may be destroyed by the proposed taking of this private property right.

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d. Buckeye's policy concerning refund of "hook-up" charges, which will demonstrate that no subscriber will suffer any financial loss if Buckeye is permitted to carry "distant signals" pending resolution of legal and policy questions raised by these new rules.^{11/}

e. The importance of the distant signals to the economic success, viability, and survival of the Buckeye CATV system, and the possibility that this entire service (all service, not just distant signals)

11/ This question is treated fully in Buckeye's Petition for Reconsideration and Consolidation being filed this date.

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may be destroyed if the system cannot carry the distant signals.

f. The extent of audience "fragmentation" which may be expected from development of this CATV system with capacity to carry distant signals, and the impact which such "fragmentation" will have upon development of independent broadcasting service in the area and in the country.

g. The benefits which new local television broadcast stations in Toledo and elsewhere, particularly stations operating in the UHF band, may be expected to gain from operation of the Buckeye CATV system.

h. The economic resources available in Toledo to ensure support for and development of ample local television service.

i. The nature, quality and availability of the television service rendered by stations presently serving Toledo.

j. The nature and quality of distant signals which are available off-the-air.

k. Facts concerning the impact which CATV systems have had upon local television service in comparable markets.

1. Other evidence relevant to the issues outlined in the preceding paragraph.

9. As observed above, on March 25, 1966, the same day that the Commission issued its order to show cause in this case, Buckeye filed

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with the Commission: (1) A Petition for Reconsideration of the new CATV rules and (2) a Petition of Buckeye Cablevision, Inc., for Declaratory Ruling, for Waiver or Other Appropriate Relief. Since these petitions contain facts and matters which must also be considered in connection with this petition to clarify or enlarge issues, the two petitions filed by Buckeye on March 25, 1966, are incorporated by reference herein. In addition Buckeye incorporates herein by reference its Petition for Reconsideration and Consolidation filed with the Commission this date.

2. Points and authorities in support of petition to clarify or enlarge issues.

10. This proceeding has been instituted pursuant to authority contained in Sections 312(b) and 312(c) of the Communications Act. Section 312 of the Act deals generally with the subject of "Administrative Sanctions", and basically covers the grounds for action and the procedures to be followed in (1) revocation cases and (2) cease and desist cases. It is plain from a reading of the section that the same procedures must be followed in cases involving revocation and in cases involving cease and desist orders. Revocation procedures and cease and desist procedures are equated and identical in Section 312(c) (concerning notice, hearing and decision), Section 312(d) (concerning burden of proof), and

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Section 312(e) (concerning applicability of Section 9(b) of the Administrative Procedure Act). It thus may be assumed at the outset that the scope of the issues in a cease

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and desist proceeding is at least as broad as the scope of the issues in a revocation proceeding.^{12/} Similarly, since revocation of a license is far more drastic action than modification of a license, it is manifest that the scope of the issues in a revocation proceeding (and, of course, in a cease and desist proceeding) must be at least as broad as the scope of the issues in a modification proceeding instituted under Section 316 of the Act. The show cause hearings specified in Sections 312 and 316 of the Act are all clearly designed to afford procedural due process to persons who have acquired valuable property rights.^{13/} With these self-evident principles in mind, various authorities concerning the scope and nature of the required hearing may be considered.

11. Any Commission action must be tested by the "touchstone" of the public interest, and must, of course, observe "the basic requirements designed for the protection of private as well as public interest". Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). Even after the Commission promulgates new rules to change the status of a licensee, that party is entitled to a full hearing

^{12/} Both types of hearing are, of course, designed to insure due process and require a full evidentiary hearing. Morgan v. United States, 304 U.S. 1 (1937).

^{13/} See footnote 12, supra.

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concerning whether the broad public interest, convenience and necessity will be served by a modification of

its license. Mere adoption of rules will not foreclose an injured party's right to a full adjudicatory hearing concerning the impact of such rules upon the public interest Federal Communications Commission v. National Broadcasting Co. (KOA) 319 U.S. 239 (1943). The hearing which is mandatory prior to even a modification of a license is required by the due process guarantee of the Constitution. It must encompass all relevant questions of law and fact concerning the public interest. In exercising its quasi-judicial powers, the Commission must satisfy the demands of due process, which requires the opportunity for presentation of evidence, cross examination of witnesses and argument on the evidentiary facts and applicable law. L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 188-190 (1948). In particular, when the Commission takes action which will destroy property rights, the Courts will hold the Commission to a strict standard. The Commission may not needlessly destroy private property to achieve a result that could well have been obtained by less drastic action. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411 (1947). See also, Journal Co. v. Federal Radio Commission, 60 U.S. App. D.C. 92.

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12. Implementation of a new rule which will deprive a party of valuable property rights raises major questions concerning procedural due process of law. This holds true whether the rule is to be implemented by a modification proceeding or by a cease and desist proceeding. In both cases, an order to show cause must first be issued (Sections 312 and 316 of the Communications Act). In both cases, an injured party is entitled to a full evidentiary hearing, and this hearing must concern all aspects of the public interest in the action proposed. That the Commission has recognized this in the past is clear from a review of the Evansville deinter-

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mixture case — similar to the instant case in many respects. There, the Commission conducted a rule-making proceeding and concluded that the public interest would be served by deleting Channel 7 from Evansville and substituting Channel 31 in its place. Evansville Deintermixture Case, 15 RR 1573. The action is comparable to the Commission's adoption in its Second Report and Order of rules to prohibit CATV systems from carrying distant signals. In the Evansville case, Section 316 of the Act required a hearing before station WTVW would be required to modify its operation from Channel 7 to Channel 31. In the instant case, a hearing is required under Section 312 of the Act before the Commission may order Buckeye to cease and desist. In both cases, implementation of a new rule

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affecting established property rights could not be accomplished without a full hearing, despite the fact that a public interest determination had already been made in a rule making proceeding.

13. Manifestly, the Evansville case and the instant case are procedurally identical. However, the contrast between the show cause proceedings accorded to Evansville Television, Inc., and the minimal hearing to be accorded Buckeye is striking. In Evansville, the Commission did not take the position that the sole issue in the show cause proceeding was "compliance with the rule". It accorded the licensee the fullest possible evidentiary hearing on all questions affecting the public interest in implementation of the new rule. As the Commission observed in that proceeding, ". . . the factual question of whether the public interest would be served by deletion of Channel 7 from Evansville should be tried in the crucible of an evidentiary hearing . . ." Evansville Deintermixture Case, 15 RR 1586e, 1586f.

14. The show cause proceedings designed to insure procedural due process required by Sections 312 and 316 of the Act are indistinguishable. In Evansville, the respondent was accorded a full evidentiary hearing concerning all legal and factual aspects of the proposed modification. In the instant case, it appears that the Commission contemplates a taking of Buckeye's property on the basis of data, evidence, and conclusions which

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have never been subjected to the "crucible of an evidentiary hearing." Buckeye respectfully submits that due process in Evansville should be no greater than due process in Toledo.^{14/}

15. The hearing contemplated by Section 312(c) of the Communications Act can not be abbreviated in the form which the Commission seems to contemplate in its hearing order in this case — a simple inquiry to determine whether Buckeye is complying with the Commission's new CATV rules. A cease and desist order would destroy and, in fact, confiscate valuable property rights held by Buckeye and validly granted by Toledo authorities.^{15/} Agency determination in the nature of an adjudicatory hearing affecting private legal rights requires a full evidentiary hearing. Morgan v. United States, 304 U.S. 1 (1937). Agency rules may not be applied to take property without due process of law, and due process of law requires a full evidentiary hearing. This

^{14/} It is interesting to observe that the Commission was successful in deintermixing Bakersfield, California without the full evidentiary hearing required in Evansville. Transcontinent Television Corporation v. Federal Communications Commission, 113 U.S. App. D.C. 384 (1962). This was legally possible, however, only because the Commission ordered deletion of the VHF channel at the expiration of the

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license. (See e.g. Marietta Broadcasting, Inc. 20 RR 675, 678, holding that matters of decisional importance in a rule making decision are not barred from consideration in a Section 316 evidentiary hearing.) Since Buckeye holds no license, this approach to implementation of the rules is not available in this case.

- 15/ This obvious confiscation raises interesting questions, which the Commission should consider, concerning the cost of enforcing these rules.

(continued)

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proposition has been developed very lucidly by Judge Prettyman in Jordan v. American Eagle Fire Insurance Co., 83 U.S. App. D.C. 192 (1948). Discussing the distinctions between the legislative (or rule-making) power and the enforcement power, he recognized that the legislative process at times may not even require any hearing. Such conclusion, however, does not solve the problem of procedural due process raised by implementation of the rule when implementation requires a taking of property; "The due process clause provides that no one shall be deprived of his property without due process of law; and the 'due process' which must be accorded in enforcement of a reduction in rates includes a judicial type of hearing before a capable tribunal." The procedural necessities include the revelation of the evidence upon which the disputed order is based, an opportunity to explore that evidence (to rebut it and to cross examine) and a conclusion based upon reason. Jordan v. American Eagle Fire Insurance Co., supra, (at 199, emphasis supplied).

16. Procedural due process cannot be supplied by a rule making

- 15/ (continued) Most of this petition is concerned with procedural due process. Substantive due process,

however, requires just compensation for destruction of property rights — including franchise rights. This may raise budgetary problems not foreseen when the Second Report and Order was adopted. See, Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892). This taking of property without just compensation is, of course, contrary to the provisions of the Fifth Amendment of the Constitution, and is an additional reason why these rules are unlawful.

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proceeding followed by a truncated "hearing" which is really not a hearing at all. "It is elementary * * * in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have the opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross examine witnesses, to introduce evidence on his own behalf, and to make argument." Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 82 (1948). The facts upon which the Commission relied in adopting its new CATV rules were never subjected to cross examination or rebuttal evidence. They were not even subjected to the thoughtful process of oral argument. Of utmost importance, they have not been considered at all in relation to the local situation in Toledo, Ohio, and in the light of circumstances which require waiver of these rules with respect to Buckeye.^{16/} Adoption of a rule cannot solve all problems of regulation in the dynamic television industry — particularly when that rule would deprive a person of a property right. Mr. Justice Rutledge summarized this principle in National Broadcasting Co. v. Federal Communications

^{16/} In a separate pleading filed this date, Buckeye requests that its petition for waiver be consolidated

with this cease and desist proceeding. Even absent the statutory requirement of a hearing under Section 312 of the Act, it is respectfully submitted that the facts and matters alleged in this waiver request require the holding of a full evidentiary hearing. See e.g., United States v. Storer Broadcasting Co. 351 U.S. 192 (1955).

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Commission, 76 U.S. App. D.C. 238, 243, affirmed sub nom. Federal Communications Commission v. National Broadcasting Company (KOA), 319 U.S. 239. Discussing the rights of a licensee to resist a relatively minor modification of its license, he recognized that license rights "revocable in administrative discretion", may not even be the sort of property rights protected for purposes of substantive due process (Buckeye's property rights, of course, do not depend upon Commission license and clearly are entitled to full due process). Even this minor property right, however, required full procedural due process and required protection from the sort of arbitrary administrative action which might be taken without a full hearing:

"Procedural due process protects * * * against this, and does so notwithstanding the broad rule-making power and discretion given the Commission concerning the manner of conducting its business." (id at 243, emphasis supplied).

The premises considered, it is respectfully submitted that the issues in this case should be enlarged in the manner suggested above to ensure that Buckeye is accorded due process of law. It would indeed be regrettable if a question as important as the Commission's authority to regulate CATV should be clouded in the first instance by Commission failure to observe a fundamental procedural safeguard guaranteed by the Constitution of the United States.

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April 18, 1966

Respectfully submitted,
Buckeye Cablevision, Inc.

/s/ Robert A. Marmet

/s/ Edwin R. Schneider, Jr.

/s/ William P. Sims, Jr. (ERS)

Its Attorneys

[Certificate of Service dated April 18, 1966]

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**PETITION FOR RECONSIDERATION
AND CONSOLIDATION**

(To be acted upon by the Commission)

Buckeye Cablevision, Inc. (Buckeye), by its attorneys, respectfully requests that the Commission reconsider its Order to Show Cause in this proceeding (FCC 66-273, released March 25, 1966) in the respects suggested herein. In the event that the Commission determines to proceed with this case contrary to this request for reconsideration, Buckeye requests that the questions and issues raised by the "Petition of Buckeye Cablevision, Inc., for Declaratory Ruling, for Waiver or Other Appropriate Relief" (filed on March 25, 1966 in Docket No. 15971) be consolidated for hearing with this show cause proceeding. The following is submitted in support of this request:

A. Preliminary statement and incorporation by reference

1. In the instant proceeding, the Commission has ordered Buckeye to show cause why it should not be required to cease and desist from carrying

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two "distant signals" on its CATV system in Toledo, Ohio. On the same day that this Order to Show Cause was released by the Commission, Buckeye filed two pleadings with the Commission:

- a. A Petition of Buckeye Cablevision, Inc., for Declaratory Ruling, for Waiver or Other Appropriate Relief. This petition set forth, inter alia, facts and considerations demonstrating the need for a waiver of the Commission's Rules to permit the Buckeye CATV system to carry two "distant signals" from stations located in Lansing and Detroit, Michigan.
- b. A Petition for Reconsideration. This petition was addressed generally to the new CATV rules adopted in the Second Report and Order (31 F.R. 4540), and specifically to those portions of the Second Report and Order which defined "distant signals" and which applied these new rules to Buckeye retroactively in violation of law.

2. Because the facts and considerations contained in the two petitions filed on March 25, 1966, are relevant to consideration of this Petition for Reconsideration and Consolidation, these two pleadings are incorporated by reference herein. In addition, Buckeye is filing on this date a "Petition to Clarify or Enlarge Issues and Motion that Petition be Certified to the Commission". This petition is also incorporated by reference herein, as it contains facts and considerations which should be weighed by the Commission in passing upon the instant petition. It is addressed to the Review Board under the provisions of Section 0.365(b)(1) of the Rules, with a request that the Review Board certify it to the Commission under the

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provisions of Section 0.361(b) of the rules, 1/ because of the novelty of the issues, and because of the inter-

relation of Buckeye's request for enlargement of issues with questions which Buckeye presents directly to the Commission in the instant petition.

3. Before closing this preliminary statement, Buckeye deems it appropriate to state that its participation in this proceeding in any form, whether it be the filing of petitions or attendance at a hearing, should not be construed under any circumstances as a waiver of its right to contest, at any stage of this case, the jurisdiction of the Commission over the person of Buckeye or the entire subject matter of CATV.

B. Questions which should be reconsidered by the Commission

1. The Commission should withdraw the order to show cause, as it seeks enforcement of unlawful rules.

4. A threshold question in any proceeding designed to enforce agency rules is the question of legality of the rules. Obviously, an unlawful rule may not be enforced. The Commission's authority to adopt

1/ Section 0.361(c) of the Commission's Rules provides that the Commission may direct that matters pending before the Review Board be certified to the Commission. The rule also provides that, "no petition requesting the Commission to take such action will be entertained." Consequently, Buckeye can not petition to initiate certification of this question, but it does seem appropriate, in the interest of orderly procedure, to suggest that the Commission consider such certification.

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any rules regulating CATV systems was subject to great controversy in comments filed in Docket 15971. It is not expected that this controversy will be resolved in the instant proceeding, and it would appear that exten-

sive and lengthy argument concerning the numerous major questions raised by these new rules would be futile in this pleading.

5. Nevertheless, to preserve the point for further review, and to avoid any possible future claim of waiver, Buckeye requests that the Commission reconsider and rescind its Order to Show Cause in this proceeding, on the ground that the rules which the Commission adopted in the Second Report and Order are unconstitutional, beyond the scope of the Commission's authority under the Communications Act, and an unreasonable exercise of the Commission's authority. 2/

2. It is unreasonable to proceed with this show cause proceeding before there is a final determination concerning the legality of these rules.

6. As observed above, there are very substantial questions concerning the legal basis for the Commission's new CATV rules. These questions will undoubtedly be resolved with the passage of time. In the meanwhile, there appears to be no point in prosecuting this cease and desist case, pending final administrative, judicial and congressional review

2/ If Buckeye is allowed an opportunity to do so, it proposes to brief these questions extensively at an appropriate stage prior to the Commission's decision in this case.

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of the subject, unless there is some threatened and irreparable harm to the public interest resulting from Buckeye's action in carrying two distant signals.

7. As demonstrated in Buckeye's Petition for Waiver, 3/ Buckeye will be seriously and irreparably injured if it is forced to cease and desist from carrying the two

distant signals, pending final determination of the validity of the Commission's new rules. Buckeye has formed a bona fide business judgment that its current operation with Lansing and Detroit signals is the minimum type of service which it can render without substantial and irreparable injury (Petition, p. 3, 4). To force Buckeye to interrupt its service, pending final review of these rules, seems extremely unfair, unless this extraordinary and hasty action is required to prevent harm to some other person or to the public interest. The question of whether this cease and desist proceeding must be pursued with such extraordinary vigor, in the face of major questions concerning legality of these rules, invokes overtones of equitable relief by way of injunction or stay. In such cases, a major consideration is the balancing of equities of the parties concerned, and the balance of possible injury among affected parties. Virginia Petroleum Jobbers Association v. Federal Power Commission,

3/ Petition of Buckeye Cablevision, Inc., for Declaratory Ruling, for Waiver or Other Appropriate Relief, filed March 25, 1966.

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104 U.S. App. D.C. 106, 110 (1958). The irreparable injury which Buckeye could suffer from an order to cease and desist pending review of these new rules is clear and has been established above. Who will be injured if Buckeye is allowed to continue its current operation?

8. No subscriber to the Buckeye service will be injured if the Commission postpones this cease and desist proceeding pending final determination of the legality of these new rules. Buckeye's management has determined that no subscriber shall be misled to his financial detriment by an expectation that the system will carry distant signals which it may not be allowed to carry if the Commission rules are sustained upon review. Conse-

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quently, Buckeye has adopted a policy that any subscriber who states at any time in the future that he wishes to cancel his service because the system has been forbidden the right to carry distant signals may cancel his service and have his "hook-up" charge refunded (See affidavit attached as Exhibit 1). The only money the subscriber will have spent will be the monthly charges for the service he bargained for. There will thus be no injury to the public.

9. It is, of course, ridiculous to suggest that any new UHF station serving Toledo would suffer any loss or receive any adverse impact from permitting the current Buckeye operation to continue until the new rules are finally reviewed. Since UHF conversion is far from complete in Toledo, the

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CATV system will actually aid new UHF stations by making the station's signal available on all subscribers' sets, whether equipped for UHF reception or not. Buckeye will, of course, observe the carriage and non-duplication provisions of the Commission's new rules, designed to protect local stations. The Commission has found nowhere in its Second Report and Order, or elsewhere, that there is any immediate and present danger to any Toledo station.

10. The balance of equity and injury clearly favors Buckeye. It will be irreparably injured by a cease and desist order issued before anyone even knows whether the Commission's rules may be enforced. In contrast, no party will be injured by postponing this proceeding until termination of administrative and judicial review. The massive engine of federal regulatory power should not be set in motion until it has been finally determined that the engine is on the right track. The people of Toledo and environs should be allowed to receive the service which their elected local representatives have authorized, at

least until the rules designed to terminate this service have finally been held lawful.

11. An additional circumstance requires that the Commission postpone this hearing pending final review. This involves the problem of futility. Buckeye must and will resist an order to cease its operation with every legal resource at its command. The Commission cannot, of course,

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enforce a cease and desist order. If it issues such an order it must seek enforcement in the Courts under Section 401(b) of the Communications Act. If the Commission prevails in the district court, Buckeye will exhaust its rights to judicial review, as Buckeye cannot comply with an order issued pursuant to rules of questionable legality until those rules have finally been tested in the judicial process. Curiously, by the time this enforcement process is completed, there will already have been a resolution of the legality of the rules by direct appeals from the Second Report and Order. All of the energy, time and resources which would be consumed by the Commission, by Buckeye, by the Court and by a brigade of exhausted lawyers will have been wasted. The better course is to wait and see if these rules withstand review.

3. If the Commission insists upon proceeding with this show cause proceeding, it should amend the time schedule set forth in the Order to Show Cause.

12. Buckeye sincerely hopes that the Commission will be persuaded by the facts and considerations set forth in the above paragraphs, that it would be unfair and futile to prosecute this order to show cause until such time as the question of legality of the Commission's rules has been resolved. However, if the Commission concludes that the public interest requires prosecution under these

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rules prior to the time when they are finally judged to be legal, it is respectfully requested that the

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Commission alter the time schedule for this hearing set forth in the Order to Show Cause. 4/ The schedule is uncommonly restrictive. Only the bare statutory minimum of thirty days has been allowed to respond to the Order to Show Cause. Proposed findings of fact and conclusions of law in this first test of new rules must be submitted within 7 days after the record is closed.

13. As Buckeye has observed in the above paragraphs, it is difficult to understand why the Commission believes that the public interest so imperatively and unavoidably requires such unprecedented rapid disposition of the case. This proceeding involves questions of Commission jurisdiction, power, authority and policy almost unprecedented in scope. These new rules are designed to extend the Commission's power over an entire new industry. Monumental legal questions are raised by this assertion of jurisdiction. 5/ As noted in the Petition to Enlarge Issues,

4/ This request is comparable to a request for continuance which would normally be addressed to the Hearing Examiner, under the provisions of Section 0.341 of the Commission's Rules. However, since the Commission specified this schedule in its order, it is doubtful that any Hearing Examiner would alter the schedule in the face of the Commission's direction to proceed expeditiously. Consequently, since the request really seeks reconsideration of a schedule set forth in an Order, Buckeye is submitting this request directly to the Commission, and also submitting a brief request for continuance to the Hearing Examiner, with the suggestion that it be certified to the Commission under the provisions of Section 0.341(c) of the Rules.

5/ e.g. The Commission's Second Report and Order occupies over 30 pages of very small type in the Federal Register. The shelves of the Commission's Docket Division are strained by the burden of comments filed on these rules — many exceeding 200 pages.

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filed this date, this hearing is actually far more complicated than the Commission has stated in its Order. Even if the proceeding were as simple and abbreviated as the Commission seems to contemplate, 6/ there would still be major questions concerning constitutionality, statutory interpretation, and reasonableness of these rules. To restrict Buckeye to thirty days for preparation of this case and seven days for briefing it is a plain denial of due process of law. "Justice requires that [a party] should receive notice of charges a sufficient time in advance of a hearing to enable him to prepare his defense" Brahy v. Federal Radio Commission, 61 U.S. App. D.C. 204, 205 (1932). Undersigned counsel represents to the Commission that the physical drains of preparing this case, coupled with reasonable attention to the affairs of other clients, imperatively requires that this restrictive time schedule be relaxed.

14. This request for more time to prepare and present this case is not merely designed for the comfort and convenience of counsel. It actually goes to the roots of due process and to the right of a respondent

6/ See Para. 5 of Order to Show Cause in this case, stating that the only issue to be resolved is compliance with the rule.

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to prepare for trial with the assistance of counsel. 7/ Due process requires that a respondent be afforded adequate notice to present a claim or defense, with the assistance

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of counsel. Anderson National Bank v. Lockett, 321 U.S. 233 (1944). Assistance of counsel is meaningless unless counsel is given an adequate opportunity to prepare and brief a case. To press toward a hasty hearing which effectively deprives a party of the assistance of counsel may result in a hearing in form, but it cannot be considered a substitute for the required hearing in substance. Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327. Undersigned counsel respectfully represent to this Commission that the numerous critical and novel issues raised by the Commission's new rules can not be treated adequately if this emergency schedule is maintained. To hold to such a schedule will not only deprive Buckeye of the effective assistance of counsel, it will also deprive this Commission of the benefits which a full adversary proceeding contributes to resolution of legal issues. Further it will deprive reviewing courts of a full record. It is manifestly unfair that this same Commission

7/ Section 7(a) of the Administrative Procedure Act provides that: "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel . . . Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." (Emphasis supplied)

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which has an interest in sustaining these rules upon judicial review should hold counsel to a schedule which will prevent effective review on a full record. 8/ The Commission should not prevail on review solely because counsel for respondent has become exhausted. 9/

15. Buckeye respectfully requests that it be accorded a minimum of 60 days to prepare this case and a mini-

num of 60 days to submit briefs. Anything less would be a denial of due process.

4. The Commission must clarify its reference in paragraph 4 of the Order to Show Cause to the request for an evidentiary hearing required by Section 74.1107 of the Rules before Buckeye is forced into this hearing.

16. In its Order to Show Cause released on March 25, 1966, the Commission made the following statement in paragraph 4:

"Buckeye has not made the request for an evidentiary hearing required by Section 74.1107 of the Rules and has otherwise failed to comply with the provisions of that Section. Buckeye will therefore be directed to show cause why it should not be ordered to cease and

8/ The dangers of combining in one person or agency the powers of prosecutor and judge are familiar to all students of administrative law. An agency combining these functions must be especially careful to ensure a fair hearing. See, e.g. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

9/ Counsel has already found new meaning in Shakespeare's: "This sweaty haste doth make the night joint labourer with the day." Hamlet, I, i. 77. Regrettably, even with night and day exhausted, the few days available are not long enough to prepare and brief this case.

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desist from continuing to operate its CATV system in violation of the requirements of Section 74.1107."

Actually, on the same day this order was released, Buckeye filed with the Commission its "Petition of Buckeye

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Cablevision, Inc. for Declaratory Ruling, for Waiver or Other Appropriate Relief." This petition was filed pursuant to the provisions of Section 74.1109 of the Commission's new rules. However, by public release dated March 31, 1966, the Commission issued a release under the title "CATV Requests Filed Pursuant to Section 74.1107(a) of the Rules," and listed Buckeye Cablevision as a party which had filed such a request. Actually, Buckeye has filed no request under Section 74.1107(a) of the Rules. 9A/

17. The Commission's treatment of the Buckeye petition in its public release, coupled with the language of paragraph 4 of the Order to Show Cause, raises major questions of uncertainty concerning the conduct of the hearing. It appears from a reading of paragraph 4 that if Buckeye had made the request required by Section 74.1107 of the rules, the mere making of this request would somehow be relevant to the question of whether Buckeye should be ordered to cease and desist. Although Buckeye has made no such request, the Commission has stated that it has. Buckeye is therefore in a position of wondering whether the scope of this proceeding will somehow be affected by the Commission's

9A/ Buckeye serves notice on all parties that it will take the position that the Section 74.1109 petition shall be treated as such for all purposes, including time for response.

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view that it has filed a pleading pursuant to a section of the Rules, despite the fact that it did not do so. Buckeye respectfully submits that it is entitled to have this ambiguity in the hearing order clarified before it is directed to show cause.

5. The abbreviated hearing procedure which the Commission has established for this case is unlawful.

a. There has been no record finding that the Commission's functions imperatively and unavoidably require this procedure.

18. In paragraph 5 of its hearing order in this case, on the basis of an asserted finding that due and timely execution of its functions imperatively and unavoidably requires such action, the Commission has directed that the Examiner certify the record of this case, upon its closing, immediately to the Commission for final decision. In the same paragraph, the parties to the proceeding are allowed 7 days for submission of proposed findings of fact and conclusions of law. This drastic action is apparently taken under the provisions of Section 409(a) of the Communications Act, which reads as follows: 10/

10/ A similar provision in Section 8(a) of the Administrative Procedure Act is applicable only to rule-making and licensing, neither of which is involved in this cease and desist case.

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"In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision."

19. It will be observed that this Section of the Act requires that the extraordinary expedited procedure may

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be invoked only on the basis of a finding "upon the record". Section 7(d) of the Administrative Procedure Act defines "record" in the following language:

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decisions . . ." (Emphasis supplied)

The finding which the Commission made in its Order to Show Cause was not based upon the record of this case. In fact, the Order to Show Cause is really the start of the record. Buckeye submits that this is a matter of utmost importance. It goes to the roots of Buckeye's objection that an expedited enforcement hearing has been instituted in this case when there is really no need for such expedition. Had the Commission actually reviewed any record, it would be unable to find any facts or circumstances justifying this needless expedition. The process of certification is an emergency matter, depriving respondents of the critical right to have an initial decision prepared and carefully reviewed by the Commission. An

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unwarranted conclusion, based upon no review of facts, can not be used to deprive a respondent of valuable procedural rights.

20. A strict standard is applied in determining compliance with these emergency provisions of Section 409. Failure to make the appropriate finding upon the record will invalidate an expedited proceeding. Channel 16 of Rhode Island, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 179, 183 (1956). The procedure has been sustained only when the record sustained the basis of the Commission's statutory finding. RCA Communications, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 163 (1956). There is no such

record in this case, and if there was, it would not sustain such a finding. 11/ Very simply, there is no reason why execution of the Commission's functions requires an emergency procedure which forecloses the respondent from time for full preparation and presentation of its case.

- b. Section 312(e) of the Act requires a hearing in accordance with Sections 7, 8 and 9 of the Administrative Procedure Act

11/ Where a finding is required prior to issuance of an order, absence of evidence to support this finding will render the finding void and without effect. Federal Trade Commission v. Raladam Company, 283 U.S. 643, 648, 649 (1931). An agency order not supported by evidence is void. Chicago, Rock Island & Pacific Railway Company v. United States, 274 U.S. 29 (1927).

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20. Section 312(e) describes the procedure which governs the Commission in conducting a cease and desist proceeding. This section expressly states that the provisions of Section 9 of the Administrative Procedure Act (concerning proceedings for revocation) shall apply to cease and desist cases. Section 9 of the Administrative Procedure Act provides that such hearings shall be conducted pursuant to Sections 7 and 8 of the Administrative Procedure Act. Sections 7 and 8 of the Administrative Procedure Act require the customary procedure for hearings. The officer who presides at the hearing must first issue an initial decision, and the respondent has an opportunity to file exceptions and briefs. The emergency procedure may not be invoked by the Commission in this cease and desist case. 12/

21. It might be argued that Section 409(d) of the Act supersedes and modifies the Administrative Procedure Act in this respect. This argument could not be sustained,

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however. Section 409(d) of the Communications Act provides that: "To the extent that the foregoing provisions of this section . . . are in conflict with the Administrative

12/ It should be noted that, even if the Communications Act should justify and authorize emergency procedure, the procedure would still be unconstitutional as a denial of procedural due process, which requires a full hearing. Morgan v. United States, 304 U.S. 1 (1937).

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Procedure Act . . ." the Administrative Procedure Act shall be held to be superseded and modified. However, this applies only to Section 409 not to Section 312. Section 312 expressly requires that the Administrative Procedure Act shall govern.

c. Buckeye may not be denied an opportunity to file exceptions to an initial decision.

22. It is not clear whether the Commission contemplates that its decision in this case shall be subject to exceptions. This question should be clarified on reconsideration, as Section 409(b) of the Communications Act clearly gives a party the right to file exceptions.

d. The Commission may not disregard, waive or suspend its own rules designed to assure respondents of procedural safeguards.

23. An administrative agency may not disregard, waive or suspend its own procedural rules which were designed for protection of fundamental rights. Vitarelli v. Seaton, 359 U.S. 535. The procedure outlined in the Commission's Order to Show Cause seems to contemplate suspension or waiver of rules designed to protect the rights of a respondent in the following respects:

a. Section 1.261 allows a party 10 days after notice of certification of transcript to file a mo-

tion for correction of the transcript. The 7 days allowed for filing findings and conclusions precludes this.

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- b. Section 1.273 contemplates 20 days for filing proposed findings of fact and conclusions, even in a simple case.
- c. Section 1.274 provides for certification to the Commission only on the basis of a finding "upon the record" that the emergency procedure is required. There is no record in this case, but the Commission has made the finding already. This section of the rules clearly contemplates that the same record which is certified must be the basis for the finding.
- d. The entire procedure for review set forth in Sections 1.276 and 1.277 of the Rules will be ignored and suspended in accordance with the terms of the hearing order.
- e. The entire procedure for final Review by the Commission will similarly be bypassed.
- f. Section 1.91 of the Commission's Rules, specifically governing the conduct of show cause proceedings provides for an initial decision, exceptions and oral argument. Apparently, the Commission proposes to suspend this rule, also.

24. For reasons recited in the above paragraphs, the abbreviated hearing contemplated by the Commission is unlawful. The Commission should reconsider its order and revise it to allow Buckeye its full hearing rights guaranteed by the Constitution, governing statutes, and its own rules.

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C. Request for Consolidation

25. Buckeye suggests that the facts and considerations set forth in its "Petition of Buckeye Cablevision, Inc. for Declaratory Ruling or Other Appropriate Relief" filed on March 25, 1966 (hereinafter "Petition for Waiver"), be considered at the same time that the Commission hears evidence on the Order to Show Cause. Consequently, it is requested that the

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Commission consolidate a hearing on the Petition for Waiver with the instant show cause proceeding. Such consolidation would, of course, automatically expand the scope of the consolidated proceeding to include a question of whether due process and the public interest require that the Commission's new Rules be waived so that Buckeye may continue its current operation.

26. In its Order to Show Cause in this case, released March 25, 1966, the Commission observed:

"Buckeye asks that the Commission take no action until its petitions and pleadings, to be filed on March 25, 1966 have been studied. We note that such documents can be considered by the Commission at the time of the hearing ordered herein."

From this statement, it appears that the Commission may already contemplate a full hearing on the facts and considerations set forth in the waiver request, and perhaps this request for consolidation is not even necessary. However, the Commission's statement at Paragraph 5 of the Order that the only issue in this case is "compliance with the rule" raises some ambiguity, which should be clarified.

27. The case for a consolidated hearing on the Petition for Waiver is particularly strong. This Petition for Waiver is already before the Commission, and is already

incorporated by reference herein. Its merits need not be argued at great length in this pleading. It seems sufficient to

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state that this sworn petition for waiver contains persuasive and compelling reasons why the new rules should be waived to permit Buckeye's continued operation. These include:

- a. The fact that these rules were applied retroactively to Buckeye jeopardizing a multi-million dollar investment by a legitimate business enterprise in the process of development since 1964, without good cause, and amount to a confiscation and denial of substantive and procedural due process.
- b. The fact that the two "distant signals" carried on the Buckeye system are actually not very distant at all. The Grade B contours of the two "distant stations" each fall only a few miles north of Toledo. This is a very minor request for waiver. 13/
- c. Buckeye is complying with all other aspects of the new CATV Rules, particularly those relating to carriage and non-duplication.
- d. The Buckeye system is not engaged in "leap-frogging", which was the primary object of the distant signal rule.
- e. The Buckeye operation would have no adverse impact upon development of UHF.

28. The need to hear the waiver request at the same time as the show cause order is particularly important when the basis of these new rules is considered. The Commission itself recognized in adopting the Second Report and Order that its imperfect knowledge of this en-

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tire new industry and unprecedented area of regulation would require waiver in appropriate cases:

"As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are

13/ This statement concerning contour location is not to be considered a waiver of proof concerning precise location of contours on city limits.

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our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. United States v. Storer Broadcasting Co., 351 U.S. 192."

Again, as the Commission observed in paragraph 155 of the Second Report and Order, "It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts." Buckeye subscribes enthusiastically to this statement. Irreparable injury should not be inflicted upon a legitimate enterprise without full consideration of all relevant facts.

The premises considered, Buckeye respectfully requests that the relief requested in the foregoing paragraphs be granted.

Respectfully submitted,

Buckeye Cablevision, Inc.

April 18, 1966

Marmet & Schneider
1822 Jefferson Place
Washington, D.C. 20036

/s/ Robert A. Marmet

/s/ Edwin R. Schneider, Jr.

Dow, Lohnes & Albertson /s/ William P. Sims, Jr.
Munsey Building
Washington, D.C. 20004
Its Attorneys

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Exhibit No. 1

AFFIDAVIT

State of Ohio

County of Lucas, ss

John D. Willey, having been duly sworn, deposes and says

(1) That he is Vice President-Policy of Buckeye Cablevision, Inc. and

(2) That the management of Buckeye Cablevision, Inc. has formulated a policy designed to ensure that no subscriber to the system shall be misled to his financial detriment by an expectation that the system will be allowed to carry the signals of station WJIM-TV, Lansing, Michigan and WKBD-TV, Detroit, Michigan, in the event that the new CATV Rules of the Federal Communications Commission should be sustained upon review. Consequently, if any subscriber states at any time in the future that he wishes to cancel his service because the Commission has forced Buckeye to delete these signals from the system, he may cancel his service and his "hook-up" charge will be refunded. This policy shall be effective for one month after carriage of such signals is terminated by Commission order.

/s/ John D. Willey

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[Certificate of service and Jurat dated April 18, 1966]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of:

Amendment of Subpart L, Part 91,
to adopt rules and regulations to
govern the grant of authorizations
in the Business Radio Service for
microwave stations to relay tele-
vision signals to community anten-
na systems.

Docket No. 14895

Amendment of Subpart I, Part 21
to adopt rules and regulations to
govern the grant of authorizations
in the Domestic Public Point-to-
Point Microwave Radio Service
for microwave stations used to
relay television broadcast signals
to community antenna television
systems.

Docket No. 15233

Amendment of Parts 21, 74, and
91 to adopt rules and regulations
relating to the distribution of tele-
vision broadcast signals by com-
munity antenna television systems,
and related matters.

Docket No. 15971
(RM Nos. 636, 672,
742, 755 and 766)

Cease and Desist Order to be
directed against Buckeye Cable-
vision, Inc., owner and operator
of a community antenna televi-
sion system at Toledo, Ohio.

Docket No. 16551

Petition of Buckeye Cablevision,
Inc. For Declaratory Ruling, For
Waiver or Other Appropriate
Relief.

File No.
CATV 100-5

To the Commission:

PETITION FOR STAY

Buckeye Cablevision, Inc. (Buckeye), by its attorneys hereby petitions the Commission to stay, with respect to Buckeye, the effective date

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of its Second Report and Order in Docket Nos. 14895, 15233 and 15971, released March 8, 1966 (FCC Mimeo 66-220/80218), and thereafter published in 31 Fed. Reg. 4540-73 on March 17, 1966, pending final orders in the above-styled proceedings. Since the Commission has instituted Cease and Desist proceedings in Docket No. 16551 to enforce the Rules adopted in the Second Report and Order with respect to the operations of Buckeye, and since Buckeye has requested Commission sanction of its operations by declaratory ruling or waiver in File No. CATV 100-5, Buckeye also addresses its Petition for Stay to those two proceedings for the duration of the requested stay of the effectiveness of the Second Report and Order. This Petition is filed pursuant to Section 1.44(e) of the Commission's Rules. Buckeye has previously filed (on March 25, 1966) a "Petition for Reconsideration" and a "Petition for Declaratory Ruling, for Waiver or Other Appropriate Relief" (Docket No. 15971 and CATV 100-5) and filed (on April 18, 1966) a "Petition to Clarify or Enlarge Issues And Motion that Petition be Certified to the Commission", a "Petition for Reconsideration and Consolidation" and a "Petition For Continuance", all in Docket No. 16551, and all of the foregoing pleadings are specifically incorporated herein by reference. In support of said Petition for Stay, the following is shown:

PRELIMINARY STATEMENT

1. On March 8, 1966, the Commission released the full text of its Second Report and Order in the above-captioned Docket Nos. 14895, 15233 and 15971. Said Report and Order was thereafter published in the Federal Register on March 17, 1966 (31 Fed. Reg. 4540-73). By means of said Second Report

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and Order, the Commission has asserted jurisdiction over all CATV systems, whether or not served by microwave, and has imposed severe restrictions upon the operation of existing and proposed systems, particularly those located within the predicted Grade A contour of any television station located within the top listed 100 ARB markets.

2. Buckeye is the owner and operator of a community antenna television system in Toledo, Ohio. On May 17, 1965, Buckeye received a non-exclusive permit from the Toledo City Council, by a vote of 9-0, to bring community antenna service to Toledo. Buckeye was organized in March 1965, and throughout 1965 and early 1966 proceeded to obtain municipal permits; to contract with Ohio Bell for construction of a CATV system for Greater Toledo; to lease office facilities and order and accept delivery of equipment; to hire and train personnel; and, ultimately, to furnish service to customers. 1/

3. Based upon Commission Rules as they existed in May of 1965, financial commitments have been made by Buckeye totaling an investment in its system to date of more than \$500,000 and obligations to Ohio Bell for additional payments of \$777,000 for installation of coaxial cable plus monthly payments that total over \$5,000,000 during the next ten years. In the belief that its proposed operations would not be adversely affected by

1/ The history, development and description of the Toledo CATV system is described in detail in the "Petition

of Buckeye Cablevision, Inc. for Declaratory Ruling, For Waiver or Other Appropriate Relief", pp. 4, et seq. (CATV 100-5), with supporting affidavit.

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reasonable regulations (presumably adopted after enabling legislation), Buckeye proceeded to construct a system which currently relies solely upon the reception of off-the-air signals, which carries every station that can be considered local in nature, and which improves the reception of television signals available to Toledo viewers off-the-air, thereby contributing significantly to the improvement of their television service.

4. When the Second Report and Order was released, Buckeye found itself not only subject for the first time to the alleged jurisdiction of the Federal Communications Commission, but also the victim of over-restrictive rules, unlawfully adopted. Pending appropriate legal determinations of the Commission's jurisdiction and the validity of its new CATV rules, Buckeye is providing the minimum service and is complying with the Commission's dubious requirements insofar as possible without substantial and irreparable injury. Buckeye submits that its current operations are at least in substantial compliance with the details of the Commission's requirements, and that they fully conform to the general purposes and objectives of the new CATV regulation; and to the extent that there is a dispute with respect to the carriage of WKBD-TV, Detroit, and WJIM-TV, Lansing, 2/ this issue must ultimately be resolved in favor of Buckeye upon the basis of equitable and public interest considerations.

5. Substantial legal questions have been raised by Buckeye's pleadings and other interested parties filing Petitions for Reconsideration

2/ Statements indicating that the predicted Grade B contours of WKBD-TV and WJIM-TV may fall barely out-

side Toledo are based on preliminary examination of published data which may or may not prove to be current or accurate, and such statements are not to be considered a waiver of proof of the precise location of contours or city limits.

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in Docket 15971. These matters are already under review before Congressional Committees and appellate courts. Nonetheless, the Commission has proceeded with unprecedented haste to institute Cease and Desist proceedings against Buckeye for alleged failure to comply with the Commission's new concept of the public interest. It is interesting to note that Toledo city officials and the public have made their preference clear by their approval and acceptance of the service provided by Buckeye; yet, the Commission has decided that the public interest in Toledo should not be what it is.

6. Buckeye intends to resist this assault upon its constitutional and property rights and is confident that it will, either in the courts or before the Congress, or in both forums, succeed. It also retains the hope that the Commission itself will eventually reconsider and adjust the position expressed in its Second Report and Order. In the meantime, however, Buckeye is faced with the immediate impairment of its franchise and its investment unless the Commission exercises its discretion and grants the stay herein requested.

ARGUMENT

7. In support of its Petition for Stay, Buckeye addresses itself to the standards recognized by judicial authority by which grounds for a stay may be measured. The judicial test applied in Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 U.S. App. D.C. 106, 110 (1958), presents the following questions for consideration:

- (1) Do substantial issues exist upon which petitioner can rely?
- (2) Without the relief requested, will petition suffer irreparable injury?

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- (3) Would other parties be harmed in a substantial way by the issue of the stay?
- (4) Where lies the public interest?

8. While it is true that the first standard set out in the Virginia Petroleum Jobbers case was somewhat differently phrased in that it was necessary for a party to show "substantial indication of probable success", it is submitted that since the Commission will ultimately be a party to any judicial review should it fail to reconsider its Second Report and Order and otherwise refuse to grant substantially the relief requested in other pending Buckeye pleadings, Buckeye should not be made to convince the Commission at this stage that it has a "substantial indication of probable success" as a party opposing the Commission on appeal. Buckeye contends that it can succeed on appeal if the Commission pursues its present course. In requesting this stay, however, Buckeye submits that its burden is met by a showing that substantial legal issues exist with respect to both substantive and procedural due process, with respect to the reasonableness of the Commission's CATV rules, and ultimately with respect to the very question of jurisdiction itself. Buckeye is confident that the Commission's actions as they apply to it are legally assailable, but it cannot expect the Commission to agree unless the Commission reconsiders its Second Report and Order, an action requested by Buckeye in its pending Petition for Reconsideration. 3/ Regardless of the Commission's treatment of the Petition for

3/ Buckeye's "Petition For Reconsideration" and "Petition For Declaratory Ruling, For Waiver or Other Ap-

[R. 73-74]

propriate Relief" were filed on March 25, 1966, only eight days after publication in the Federal Register. Despite Commission protestations of expedited consideration of in-progress CATV systems (Report of Proceedings of Committee on Interstate and Foreign Commerce, March 23, 1966, pp. 167-69, 181-83) the Commission has proceeded

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Reconsideration, there can be no question but that substantial issues do exist, militating against hasty invocation of the new Rules.

9. With respect to the issue of irreparable injury to petitioner, it cannot be disputed that the interruption of Buckeye's service to the public will constitute an injury which cannot be remedied in any satisfactory way after it occurs. Buckeye repeats that, given the opportunity, it will clearly prove that the public interest will be served by the continuation of its present service. However, the interruption of this service, for even a very short time, will shake the confidence of the public in the stability of the service and will cast a permanent shadow over the system by the continuing threat of further Government interference. Of course, if the injury which undoubtedly will be suffered can be compensated, it is not irreparable. But this kind of injury cannot be wiped out by eventual recovery from the Federal Government, since it is a continuing and insidious threat that would be created.

10. Moreover, with respect to the issue of compensation, the Commission has not chosen to provide procedures in its Rules to compensate Buckeye and other similar systems which stand to suffer severe financial losses as a result of the Commission's action. 4/ Therefore, because of the

3/ Continued.

to expedite only enforcement proceedings. Instead of expediting consideration of Buckeye's petition filed March

25, 1966 pursuant to Section 74.1109 (CATV 100-5), the Commission has attempted to extend unlawfully the time for filing oppositions thereto. (See Public Notice B-81851, March 31, 1966, which purports to allow oppositions to be filed through April 30, 1966, inconsistent with the applicable requirements of Rule 74.1109 (d).)

4/ See Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892).

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absence of any provision for compensation, it appears that the Commission is estopped from disputing Buckeye's claim that its injury will be irreparable.

11. With respect to the interests of other parties to these proceedings, there is no apparent threat to the long-term interest of any party that would be caused by the grant of a stay pending the ultimate outcome. Certainly, the short-range interests of UHF in Toledo at least would be advanced by CATV carriage. In effect, the Commission by granting the stay would be maintaining the status quo pending ultimate resolution of the issues. The equitable considerations of any other party to this proceeding are far outweighed by the immediate injury to be done to the interests of Buckeye by the imposition of these Rules. Furthermore, the interests of the people of Toledo are substantial, 5/ as are the interests of the employees of Buckeye and their families, and the shareholders of the parent companies investing in the Buckeye venture.

12. Finally, and most importantly, Buckeye contends that the public interest will not be adversely affected in any conceivable way by a grant of the requested stay. Buckeye has demonstrated in its "Petition For Reconsideration and Consolidation" in Docket No. 16551 (filed on April 18, 1966), that no subscriber to the Buckeye service will be injured if the Commission postpones enforcement of its CATV Rules pending final determination

[R. 75-76]

5/ The City of Toledo receives 3 percent of the gross income from Buckeye's CATV system, which is threatened by the Commission's actions.

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of their legality. To provide every subscriber with protection against financial detriment, Buckeye has adopted a policy by which any subscriber dissatisfied with service after discontinuation of carriage of the two alleged "distant signals" now carried by the Toledo system, may cancel his service and have his "hook-up" charge refunded. 6/ Thus, Buckeye has made a good faith showing that it is willing to make financial sacrifices to remove any conceivable threat to the public interest.

CONCLUSION

13. In this and other related pleadings, Buckeye has demonstrated that substantial legal issues exist, that Buckeye will suffer irreparable injury if a stay is not granted, that other parties will not be harmed by a grant of a stay and that the public interest favors the grant of a stay. For the foregoing reasons, Buckeye respectfully requests that the Commission consider the overall effect of the immediate imposition of its Rules upon Buckeye as weighed against a stay which is demanded by the dictates of reality and fairness.

14. The Commission is therefore respectfully requested to stay the enforcement of its new CATV Rules in Docket Nos. 14895, 15233 and 15971 and its Cease and Desist proceedings in Docket No. 16551, insofar as such rules or proceeding would preclude Buckeye from distributing to its Toledo customers signals received off-the-air, pending final orders determining

6/ See Affidavit attached as Exhibit No. 1 to Buckeye's "Petition For Reconsideration and Consolidation", filed April 18, 1966 in Docket 16551.

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the validity and such rules and the related enforcement proceedings against Buckeye.

Respectfully submitted,
BUCKEYE CABLEVISION, INC.
/s/ William P. Sims, Jr.

Dow, Lohnes and Albertson

/s/ Robert A. Marmet
/s/ Edwin R. Schneider
Its Attorneys

Marmet & Schneider

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[Certificate of Service dated April 19, 1966]

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[Excerpt From Opposition of Storer Broadcasting Company to Petition for Stay, Received by the Commission April 27, 1966.]

* * *

Buckeye has been on notice since at least April 23, 1965 — approximately a month before it received its first CATV franchise — that the Commission was considering imposing limitations on the transmission of distant signals. Since February 15, 1966, it has been on specific notice that the Commission's rules would forbid the importation of distant signals into Toledo. * * *

[Tr. 73-74, 79]

EXCERPTS FROM TRANSCRIPT OF HEARING
(April 28, 1966)

[Tr. 73]

* * *

Q. Now, sir, when did Buckeye first deliver for charge the television signals of any television stations to its subscribers?

MR. MARMET: If you do not understand the question, Mr. Willey, just ask.

THE WITNESS [John Willey, Vice President, Buckeye Cablevision, Inc.]: I think I do.

Buckeye started on March 16, 1966 transmitting signals to customers who had been signed up and hooked on to the system as of that date. We anticipated a test picture period and I am not certain of the exact arrangements for making the charge during the testing period. That is the part I am not certain of.

* * *

[Tr. 74]

* * *

Q. Do you know the present [April 28, 1966] number of subscribers you have?

MR. MARMET: I think we could supply it.

PRESIDING EXAMINER: Is that agreeable, Mr. Fitzpatrick?

THE WITNESS [John Willey, Vice President, Buckeye Cablevision, Inc.]: It would be more accurate.

BY MR. FITZPATRICK:

Q. Give me an approximation. A. 1,200.

* * *

[Tr. 79]

* * *

BY MR. NAFTALIN:

Q. Mr. Willey, you said there was a testing period. Can you tell me when that testing period expired?

MR. MARMET: I object to the question. I do not think it is all clear what you mean. Perhaps the witness understands it.

PRESIDING EXAMINER: Do you understand, Mr. Willey?

THE WITNESS: I can give you my interpretation.

BY MR. NAFTALIN:

Q. I would be grateful for that

[Tr. 80]

A. It is my understanding that when the service begins, the telephone company occasionally has to go back and check the service that the subscriber is receiving and in some cases make changes in the equipment to improve the service. I would guess the time this takes depends upon the telephone company's servicemen and takes in the case of an individual subscriber probably anything from a matter of a few hours to a few days.

Q. Would you say that that period is now over with respect to the 52 people who receive —

MR. MARMET: I object to the question.

MR. NAFTALIN: Let me finish it.

BY MR. NAFTALIN:

Q. — 52 people who are given service on March 16?

MR. MARMET: Sir, I would like to respectfully object to the question. I believe the question is not relevant and is covered by your previous rulings.

PRESIDING EXAMINER: The objection is overruled. He can answer if he knows.

THE WITNESS: I would assume it is but I cannot say from specific knowledge because I have not checked.

PRESIDING EXAMINER: Do you have any understanding in that regard, sir?

THE WITNESS: Yes.

PRESIDING EXAMINER: What is it?

[Tr. 81]

THE WITNESS: I believe the service to the subscribers who were in service on March 16 is considered to be

[Tr. 81-82, 92]

as good as we can make it.

BY MR. NAFTALIN:

Q. There was something in your testimony that indicated to me that Buckeye Cablevision did not intend to charge during this so called testing period. Did I understand you correctly? A. I believe our offer then and now to people who sign up for the service is a reduced installation charge and a reduction in the first month's service below the normal monthly charge.

Q. Are you saying I misunderstood you? A. I do not know.

Q. I will repeat the question. It was my understanding from your testimony that Buckeye Cablevision did not intend to charge for the period of testing. Now, was I correct? A. If I stated it that way, I was incorrect. The charge during the first month part of which is considered a testing period is below the regular charge both for installation and for monthly service. I believe it is a package of \$10 which includes installation and the charge for the first month's service.

Q. And these people will be charged starting from May 16?

MR. FITZPATRICK: You said May 16.

[Tr. 82]

BY MR. NAFTALIN:

Q. Excuse me, March 16. A. That is my impression, yes.

* * *

[Tr. 92]

* * *

MR. MARMET: * * * In a petition to enlarge and in a petition for a waiver and in two petitions for reconsideration Buckeye has articulated quite early its view that the Broadcast Bureau has the burden of introducing evidence to justify the Commission's new rules and that Buckeye should have the opportunity to offer evidence

demonstrating that these rules are unreasonable, that they involve involved delegations of authority, that they involve an unconstitutional denial of the right of free speech, that they involve a taking of private property without compensation and are generally contrary to the public interests.

Although Buckeye continues to adhere to this view, it frankly has no hope of convincing the Chief Hearing Examiner that evidence concerning the broad scope of this proceeding should be admitted. As the Examiner ruled at Page 14 of the transcript, "I stated I do not intend to admit into the record any collateral matter, any matter which is not directly related

[Tr. 93]

to this issue; namely, compliance with the rule."

In the face of this anticipatory ruling Buckeye realized that it would be futile to produce witnesses today to submit testimony and evidence concerning the broad issues of this case. Indeed, Buckeye has not yet even had an adequate opportunity to interview witnesses, to prepare its case for hearing on the broader issues, or to formulate an offer of proof with the degree of precision which this case justifies.

Nevertheless, in order to preserve its right to review, Buckeye believes that it must now make an offer of proof on the record of this case concerning the evidence which it would have introduced and the facts which it would have proved in this record.

* * *

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of

Cease and Desist Order
to be directed against
Buckeye Cablevision, Inc.
owner and operator of a
community antenna television
system at Toledo, Ohio

Before the Commission:

Docket No. 16551

REQUEST FOR ORAL ARGUMENT

Buckeye Cablevision, Inc., (Buckeye) by its attorneys, respectfully requests that the Commission hear oral argument in this case before it decides whether the public interest requires that it directs Buckeye to cease and desist carrying the signals of stations WKBD, Detroit, Michigan and WJIM-TV, Lansing, Michigan.

Agency action affecting property rights may not be taken without giving a respondent an opportunity to be heard orally. Morgan v. United States, 304 U.S. 1 (1937), Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73 (1948), L. B. Wilson, Inc. v.

Federal Communications Commission, 83 U.S. App. D.C. 176.

Respectfully submitted,
Buckeye Cablevision, Inc.
/s/ Robert A. Marmet

May 5, 1964

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/s/ Edwin R. Schneider, Jr.

/s/ William P. Sims, Jr.

Its Attorneys

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[Certificate of Service, May 5, 1966]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SUBPART L, PART 91, TO ADOPT
RULES AND REGULATIONS TO GOVERN THE
GRANT OF AUTHORIZATIONS IN THE BUSINESS
RADIO SERVICE FOR MICROWAVE STATIONS TO
RELAY TELEVISION SIGNALS TO COMMUNITY
ANTENNA SYSTEMS

Docket No. 14895

AMENDMENT OF SUBPART I, PART 21, TO ADOPT
RULES AND REGULATIONS TO GOVERN THE
GRANT OF AUTHORIZATIONS IN THE DOMESTIC
PUBLIC POINT-TO-POINT MICROWAVE RADIO
SERVICE FOR MICROWAVE STATIONS USED TO
RELAY TELEVISION BROADCAST SIGNALS TO
COMMUNITY ANTENNA TELEVISION SYSTEMS

Docket No. 15233

AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT
RULES AND REGULATIONS RELATING TO THE
DISTRIBUTION OF TELEVISION BROADCAST
SIGNALS BY COMMUNITY ANTENNA TELEVI-
SION SYSTEMS, AND RELATED MATTERS

Docket No. 15971
(RM Nos. 636, 672,
742, 755, and 766)

MEMORANDUM OPINION AND ORDER

(Adopted May 25, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING
A STATEMENT; COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration seven petitions for stay of the effective dates of the second report and order in dockets Nos. 14895, 15233, and 15971, 31 F.R. 4540, 2 FCC 2d 725, filed by: (1) Cox Broadcasting Corp. and Cox Cablevision Corp.; (2) Cosmos Broadcasting Corp. and Cosmos Cablevision Corp.; (3) Television Communications Corp.; (4) Columbus Broadcasting Co., Inc., and Chattahoochee Valley CATV, Inc.; (5) Buckeye Cablevision, Inc.; (6) Newhouse Broadcasting Corp., New-Channels Corp., Delhi Video, Inc., Cabletron, Inc., and Cablevision Co. of Anniston; and (7) the Jerrold Corp., Jerrold Electronics Corp., Ottawa TV Cable Co., Inc., Streator TV Cable Co., Inc., Logansport TV Cable Co., Inc., Pontiac TV Cable Co., Inc., Greater Lafayette TV Cable Co., Inc., Florida TV Cable Inc.,

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Amsterdam TV Cable Co., Gloversville TV Cable Co., Inc., Johnstown TV Cable Co., Inc., Mohican TV Cable Corp., Alpine Cable Television, Inc., Alice Cable Television Corp., McAllen Cable Television Corp., and Perfect TV, Inc. Petitioners request the Commission to stay enforcement of the rules promulgated in the second report until resolu-

tion of their concurrently filed petitions for reconsideration and until final adjudication of appeals from the second report or action by Congress, whichever should occur first.¹

2. In support of their requests for stay, petitioners assert generally, without specific factual detail, that their interests and those of their subscribers will be immediately and irreparably adversely affected unless a stay is granted because petitioners may be forced to delete certain signals from their existing CATV systems, be denied the right to carry certain signals on proposed CATV systems, and may lose considerable funds expended in connection with present and proposed CATV investments, all of which will injure the public's reception of multiple television signals. It is further alleged that substantial legal questions are raised by petitioners' petitions for reconsideration with respect to the Commission's assertion of jurisdiction and the manner in which the rules were implemented. In view of the highly contested nature of the Commission's jurisdictional and other actions, the pending court appeals from the second report and the likelihood of further appeals, petitioners assert that the Commission should stay the effectiveness of the rules pending a decision on the several petitions for reconsideration and/or on the several appeals already filed and to be subsequently filed, or until final determination by the Congress of legislative proposals in this field.

A. THE CARRIAGE AND NONDUPLICATION RULES

3. Although petitioners seek a stay of the effectiveness of all the rules promulgated in the second report and order, their petitions for reconsideration do not challenge the substantive provisions of the carriage and nonduplication rules. Apart from asserting generally that jurisdiction is lacking and that evidentiary hearing or oral testimony was required, petitioners direct their contentions primarily toward section 74.1107 of the rules governing distant signals in major markets.

¹ Except for Buckeye Cablevision, Inc., petitioners make identical points in their petitions for stay and reconsideration and request the same relief. Buckeye seeks a stay of enforcement of the rules and the cease and desist proceedings in docket No. 16551, as to Buckeye, pending final orders determining the validity of such rules, the related enforcement proceedings against it, and its petition for waiver (file No. CATV 100-5).

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4. A preliminary examination of the petitions for reconsideration does not disclose any substantial likelihood that petitioners will prevail on merits of their jurisdictional argument. The petitions merely reiterate contentions which we have already considered and rejected in the second report (2 FCC 2d at 728-734, 793-797). Nothing new has been presented to alter our conviction that "the case for present jurisdiction is a strong one" (2 FCC 2d at 733).

5. Nor are petitioners likely to prevail on the merits of their argument that promulgation of the rules on the basis of the rulemaking proceeding, without conducting a full evidentiary hearing or hearing oral argument, was violative of due process. As petitioners concede, the Administrative Procedure Act does not require oral testimony or oral argument in rulemaking proceedings. The due process requirement of the fifth amendment "is not technical": "argument may be oral

or written," so long as there is a "hearing in a substantial sense." *Morgan v. United States*, 298 U.S. 468, 481; *Inland Empire Council v. Millis*, 325 U.S. 697, 710; *F.C.C. v. WJR*, 337 U.S. 265. Petitioners do not point to any evidence or argument which they have been precluded from adducing. All interested persons were accorded a full opportunity to present factual material and policy arguments in written form and to reply to the comments of others before the rules were promulgated.

6. We concluded in part I of the second report that a general evidentiary hearing on the carriage and nonduplication rules would serve no useful purpose (2 FCC 2d at 744). Moreover, the top 100 markets procedure adopted in section 74.1107 does accord the persons affected a full evidentiary hearing "in the context of the particular request and the particular situation," a procedure which we considered better suited to promote the public interest than a hearing of an overall nature (2 FCC 2d at 782). And provision has been made in section 74.1109 for evidentiary hearing, where appropriate, in individual situations involving the applicability of the carriage and nonduplication rules and in other appropriate situations not coming under the mandatory hearing requirement in section 74.1107(a).²

² While the notice of inquiry and notice of proposed rulemaking (1 FCC 2d 453, 477) indicated that the Commission may specify oral argument or oral testimony after study of the comments, it also provided a shorter time for comments on pt. I and par. 50 of the rulemaking and stated that "the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration." We specifically stated that we would "reach an early determination" on par. 50 (1 FCC 2d at 472). In light of the comments on pt. I and par. 50, the urgent need for prompt action in the public interest, and our disposition of these aspects, we decided against oral procedures on the spun-off portions. However, further oral or written procedures may be specified on those portions of docket No. 15971 which were not resolved in the second report (see para. 51-64 of the notice).

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7. Petitioners have also failed to show that a stay of the effectiveness of the carriage and nonduplication rules is necessary to preserve them or the public from irreparable injury. We concluded in the first and second reports that these provisions generally are necessary to protect the public interest and "need impose no substantial burden on the ordinary CATV operator or his subscribers." First report and order in dockets Nos. 14895 and 15233, 38 FCC 683, 713-715; second report, 2 FCC 2d at 735-737, 747-749. The ad hoc procedures in section 74.1109 afford an adequate avenue for obtaining appropriate relief in individual situations. Indeed, the rules were not made effective as to existing off-the-air systems for an additional 60-day period to facilitate requests for waiver, our aim being to "allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted" (second report, 2 FCC 2d at 768, 789). See also, memorandum opinion and order in docket No. 15971, issued on April 21, 1966, FCC 66-354.³ We emphasized that "we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the car-

riage provisions of the rules to systems now in operation" (second report, 2 FCC 2d at 753-754).

8. In light of the foregoing, we conclude that the public interest would be served by denial of the request for stay insofar as the general effectiveness of the carriage and nonduplication rules are concerned. Petitioners have given no indication of their individual circumstances in their petitions for stay nor have they petitioned for waiver.⁴ However, if hardship circumstances exist, petitioners' proper course is to pursue their available administrative remedy.

B. SECTION 74.1107

9. The petitions for reconsideration are principally directed toward section 74.1107 of the rules. This section prohibits any CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation

³ Where a petition for waiver of the carriage provisions is filed on or before June 17, 1966, or within 15 days after any subsequent request for carriage, the system need not carry the station pending the Commission's ruling on the petition. See sec. 74.1109(h) of the rules.

⁴ Petitioners Buckeye and Cosmos Cablevision Corp. have filed petitions for waiver of sec. 74.1107, but not of sec. 74.1103.

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for the most recent year) from extending the signal of a television broadcast station beyond the grade B contour of that station except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension would be consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast service in the area. The mandatory hearing requirement does not apply to service being supplied by a CATV system to its subscribers on February 15, 1966, the date on which the Commission issued a public notice announcing that such a rule was being adopted (FCC public notice 79927). Section 74.1107 was made effective upon publication in the Federal Register on March 17, 1966, pursuant to the Commission's finding that good cause existed for immediate effectiveness (second report, par. 147; sec. 4(c) of the Administrative Procedure Act).

10. Petitioners claim that good cause has not been shown for making the rule effective on publication in the Federal Register. They further assert that the rule by its terms is retroactive, arbitrary, and unlawful in its application because the February 15, 1966, grandfathering date is geared to our public notice of February 15, 1966, which was not published in the Federal Register. In addition, petitioners urge that the notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078) did not afford specific notice of the grandfather date or of the substantive provisions of section 74.1107.

11. We believe it important to point up the issues presented. The first issue is whether there should be grandfathering and if so, the nature of such grandfathering. A second, and related, issue is whether good cause existed for making the rule effective upon publication in the Federal Register. We shall discuss these issues in turn and then treat the question of appropriate notice under the Administrative Procedure Act.

12. *The grandfather issue.*—In the second report we found that serious questions are presented as to "whether CATV operations in

major [television] markets may be of such a nature or significance as to have an adverse economic impact on the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" and as to "the relationship, if any, of proposed CATV operations on large markets and the development of pay-TV in those markets" (second report, 2 FCC 2d at 781, 770-781).⁵ We concluded that it is essential to

⁵ We need not repeat here the detailed discussion in the first and second reports as to the injury to the public if UHF should fail a second time or as to the inability of CATV adequately to replace the lost service. See second report, 2 FCC 2d at 735-736, 774-775; notice of inquiry and notice of proposed rulemaking in docket No. 15971, 1 FCC 2d 453, 468-471; first report, 38 FCC 683, 699-701; *Carroll Broadcasting Co. v. F.C.C.*, 228 F. 2d 440 (C.A.D.C.).

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examine such CATV operations before they become established or well entrenched (2 FCC at 782). We pointed out that such a procedure accords with the basic policy of the Communications Act to resolve important public interest questions before consequences possibly adverse to the public interest develop (*ibid.*). The crucial consideration was that unless the statutory policy is followed in this instance, any adverse consequences to the public would be irreparable. For, as we stated (2 FCC 2d at 782): "Once entrenched, it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest."

13. We found, therefore, that there are important public interest questions to be resolved in these major market situations. Since that is so, we could have simply made our rule applicable upon its effective date to all CATV systems, without any grandfathering; or, as urged by some of the commenting parties, we might have grandfathered only those systems which commenced operation to their subscribers before April 23, 1965 (the date of issuance of our notice of proposed rulemaking in docket No. 15971). The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated. Some appropriate form of grandfathering was therefore in order. Here again we might have chosen a date such as January 1, 1966, on the ground that there might not be too much disruption since systems which commenced operation after that date would not ordinarily have a great number of subscribers. Instead, we determined to take an approach even more liberal to the CATV industry, and adopted the February 15 grandfather date—the date on which the Commission reached informal agreement on its general policy in this area. There was widespread interest in our discussion, both in Congress and in the industries involved, and we therefore publicly announced the overall course we had determined upon.

14. There is thus no question of retroactivity, as urged by petitioners. The rules were made effective on March 17, and affected the operation of systems as of that date—not before. The real issue put forth by petitioners in this respect is not retroactivity but that the Commission should have grandfathered all systems as they were operating on March 17—the effective date of the rules (and the date of publication

in the Federal Register). But,

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in our judgment, there are sound reasons militating against such a course.

15. Because of the rapid pace of CATV growth, even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree. As set forth in the second report (2 FCC 2d at 771):

* * * CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.

It is now estimated that in the first 3 months of 1966, the period of issuance of the February 15 notice and the second report, the number of operating systems increased to 1,629 and the number of franchises not yet operating to 1,207 (Television Digest, Apr. 4, 1966, CATV addenda, p. 1). We have also been advised by American Telephone & Telegraph Co. that Bell System associated companies have effective tariffs in 37 States to furnish facilities to CATV systems which may or may not require local franchise authorization. Bell has 26 systems under construction, 50 firm orders, and over 300 letters of intent.

16. It is highly likely that a great number of the proposed systems not yet in operation are located within the grade A service contours of stations in the top 100 markets and would bring in distant signals. For, whereas existing CATV service has been largely confined to smaller markets lacking three full network services, the CATV industry has shifted its attention to the larger communities and these are the "centers of the most intense CATV development now" (second report, 2 FCC 2d at 772, 740-742). Since February 15, new operations have commenced or expanded into apparently new geographic areas in the vicinity of, or within, the cities of Toledo, San Diego, Cleveland, and Buffalo.⁶

⁶ These operations are presently the subject of Commission inquiry pursuant to sec. 74.1107 or sec. 74.1109 of the rules, or sec. 312(b) of the Communications Act.

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17. Of particular concern in our decision to adopt the February 15 grandfathering date is the tendency of some business entrepreneurs to make extraordinary efforts to commence operations before an announced deferred deadline which will confer grandfather rights. If the effective date of section 74.1107 had been postponed until 30 days after publication and the grandfathering line had been drawn either at that point or at the publication date, it is likely that many of the 1,207 franchised systems not yet in operation would have made extraordinary efforts to commence service to a token number of subscribers before the deadline, in order to be in a possible position to expand throughout the entire community without undergoing the hearing which we have found required by the public interest. It is reported, for example, in the April 4, 1966, edition of Cable Television Review (p. 3) that in Toledo, petitioner Buckeye, who is challenging the validity of the February 15 grandfathering date, "raced the clock prior to the March 16 FCC report and order deadline, and was deliver-

ing signals to 52 homes 8 hours before the 17th" (opposition of Storer Broadcasting Co. to petition for stay, p. 3).

18. Thus, the effect of grandfathering on the basis of the publication date or 30 days thereafter would have undoubtedly been an all-out effort to beat the deadline, and therefore a significant additional number of systems in operation in the top 100 markets. We have set out in the second report (par. 149) the difficult practical questions that may be raised in attempting to draw a line in the community to halt the expansion of a new system. See section 74.1107(d). It would clearly not serve the public interest to foster the development of a situation where the system just commences operation and we then attempt to act as quickly as possible to halt growth. We would be promoting disruption to the public and a chaotic situation, rather than orderly consideration of the important public interest questions raised prior to the commencement of service—the thrust of our major market, distant signals policy. In short, we simply do not believe that in a situation of rapid change we are precluded from taking immediate action to stay, pending hearing, the commencement of new operations which could be seriously detrimental to the public interest and which by the act of coming into being might preclude effective remedial action by the Commission—at least without substantial disruption to the public. Sound public interest considerations therefore existed for drawing the grandfathering line at February 15. We stress again that selection of this date was less stringent action than an earlier cutoff, and was designed to minimize any disruption in existing service to the CATV segment of the viewing public, while at the same time affording necessary protection against possible irreparable injury to the public interest from a pell-mell scramble for commencement of new operations in major markets during a hiatus.

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19. Complaint concerning the lack of publication in the Federal Register of the public notice of February 15, 1966, misses the point. That notice did not constitute Commission action and did not require any action or course of conduct by CATV systems. It simply announced, *inter alia*, the grandfathering date that had been decided upon in the Commission deliberations and which was to be incorporated in the regulations which were still to be issued. A party who commenced new distant signal operations in major markets during the period between February 15 and March 17, 1966, when section 74.1107 became effective upon publication in the Federal Register, was not in violation of the rule during that period or subject to any sanction. All that the rule requires is that distant signal operations commenced after February 15 be suspended on and after March 17, 1966, pending the requisite hearing on the merits. In short, whatever the grandfathering date selected—April 23, 1965, as urged by some, January 1, 1966, or February 15—there was no legal requirement for immediate announcement of the date and immediate publication in the Federal Register. What was legally required was publication of the rule, with its grandfathering date, in the Federal Register, and this of course was done.

20. As a practical matter, we point out that we did announce in the public notice of February 15, 1966, the consensus which had developed in our meetings, both as to carriage and nonduplication requirements

and the major market, distant signals policy (including the February 15 grandfathering date). That notice, while not published in the Federal Register, was unusually well-publicized.⁷ Significantly, none of the petitioners assert that they were unaware of the February 15 grandfathering date, and it would strain credulity if they were.⁸

⁷ For 2 or 3 weeks just before the notice was issued the Commission had received a flood of letters and telephone calls from members of the public and Congress on behalf of constituents, which reflected widespread knowledge in the CATV industry that the Commission was about to act in this proceeding. On Feb. 15, the day the notice was issued, the Commission held a press conference on the notice, which was well-attended by members of the press and other interested persons in the industries involved. The provisions of the notice were widely reported both by the general press and by the trade press. On Feb. 15 and within the next few days the Commission distributed almost 5,000 copies of the notice to persons who requested copies or otherwise inquired as to the status of the proceeding.

⁸ The National Community Television Association's newsletter of Feb. 18, 1966, sent to all the members of the association, which include petitioners, discussed in great detail the Commission's public notice, referred specifically to the Feb. 15 grandfathering date, and attached the text of the notice.

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21. *Good cause for effectiveness upon publication.*—Having determined upon a grandfathering date earlier than the date of publication in the Federal Register, good cause existed for making the rule (sec. 74.1107) effective upon publication in the Federal Register. We could have followed normal procedure and waited until 30 days after publication in the Federal Register to proceed against systems commencing distant signal operation in the top 100 markets after February 15, 1966, and continuing after the effective date. But this would not have served any useful purpose or the public interest. Since grandfathering is pegged to the February 15 date, orderly procedure and the desirability of avoiding disruption as much as possible called for prompt Commission action against any system commencing operation after that date in violation of the rules, rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Here again, this would be true whether the grandfathering date was February 15 or some earlier date.⁹

22. *The issue of appropriate notice.*—Our action was not taken without adequate prior notice to potential CATV operators and local franchising authorities. The notice of inquiry and notice of proposed rulemaking in docket No. 15971, issued on April 23, 1965, and published in the Federal Register (30 F.R. 6078), put all persons on legal notice that the Commission might take action of a substantially similar nature. We set forth at some length the subject and issues involved in CATV operations "in areas with potential for independent stations," pointing out that: "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programing sources because of overshadowing by three network services from nearby communities" (notice, 1 FCC 2d 453, at 471). In order to be "in a position to take definitive action," we specifically invited comment on a proposed rule to "prohibit the extension of the signal of any television station beyond its grade B contour into a community" located in such areas "without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community" (1 FCC 2d at 472). Further, we

indicated that this aspect of the proceeding might be spun-off for early determination (pars. 50, 67, 1 FCC 2d at 472, 477).

* Similarly, had we decided upon a later grandfathering date such as the date of publication in the Federal Register, the foregoing discussion in pars. 13-21 would be pertinent and would constitute good cause for immediate effectiveness of the sec. 74.1107 upon publication.

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23. We also invited "counterproposals as to possible alternative measures" and requested comments on "the proposals of petitioners" (1 FCC 2d at 476). The proposals of the rulemaking petitioners, which were described in the notice (1 FCC 2d at 454-463), included requests that the Commission: "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission" (1 FCC 2d at 457); "stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final rules to this effect," for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas" because the "practical and legal difficulties * * * in attempting to reverse this situation would be virtually insurmountable" (1 FCC 2d at 462); "stay * * * microwave grants for CATV use" pending the adoption of a rule which would "permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station," suggested to be "the grade B contour of the station carried, or a distance of 80-90 miles" (1 FCC 2d at 463, footnote 11); and "put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations" (1 FCC 2d at 463).

24. As a further matter, the counterproposals which were submitted in the comments (and to which all parties were given an opportunity to respond) went directly to these matters. We have summarized these comments on paragraph 50 and the proposals made therein in the appendix B to the second report (see 31 F.R. 4565-4566), and will not repeat them here. The proposals of the American Broadcasting Co. (ABC), Westinghouse Broadcasting Co., Association of Maximum Service Telecasters (AMST), Midwest Television, Inc., and others clearly dealt with paragraph 50 of the notice and with the rules finally adopted.¹⁰

¹⁰ Thus, ABC urged "the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations, stating that such a rule would apply basically to all but three of the Nation's top 100 markets * * *" (id. at p. 4566). AMST proposed the rule "that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing * * * that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area." AMST also urged that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after Apr. 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It stated that an alternative would be to apply the rule to all CATV systems operating on the date of publication of the rule which thereafter substantially expand their lines or the number of their subscribers or which increase the number of stations carried (ibid.).

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25. We stressed the factor of "notice" in the notice itself, so that persons proposing to operate CATV systems and franchising authorities would take account of the pending rulemaking in planning their future actions. We stated (1 FCC 2d at 477): "We believe it appropriate, as requested by one of the petitioners, to put all persons who now operate or propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." We concluded the portion of the notice dealing with proposed Commission action on CATV in major markets and overshadowed areas by stating (1 FCC 2d 472): "Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration."

26. There is no unusual variance between the proposals made in the notice and the provisions of section 74.1107. The requirement for evidentiary hearing merely sets forth the procedure for making the showing proposed in the notice. The use of the 100 largest television markets, as ranked by ARB, delineates the "areas with potential for independent stations"; with a few minor exceptions these markets constitute the "areas with four or more commercial channel assignments."¹¹ The use of the grade A contour, which was

¹¹ ARB market rankings are widely used by the television industry and have been used by the Commission in other rulemaking proceedings. See, e.g., notice of proposed rulemaking and memorandum opinion and order in docket No. 16068, 30 F.R. 8166; public notice No. 60894, Dec. 18, 1964. The fifth report and memorandum opinion and order in docket No. 14229, 2 FCC 2d 527, promulgating a revised table of UHF television channel assignments, summarized the assignments made in the top 100 markets, as ranked by ARB, as follows (2 FCC 2d at 551): "Thus, with minor exceptions, the top 25 markets have 6 or more unreserved assignments; the 26th to 75th markets have 5 or more unreserved assignments; the 76th to 100th markets have 4 or more unreserved assignments; and the 101st to 150th markets have 3 or more unreserved assignments." See also, fourth report and order in dockets Nos. 14229 et al., 30 F.R. 7711.

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suggested by several parties to the proceeding (second report, 2 FCC 2d at 791, 792), is a reasonable means of identifying not only "overshadowed" areas but also the area where CATV operations might have the severest impact on UHF stations in major markets (second report, footnote 63, 2 FCC 2d at 783). The questions of "effective date" and "grandfathering" were implicit components of the course of action proposed by the notice, which expressly noted and called for comments on the petitioners' requests for an immediate stay on the commencement of new operations pending determination of the merits because the "practical and legal difficulties" in subsequently "attempting to reverse the situation would be virtually insurmountable" (1 FCC 2d at 462, 476). As a further matter, the proposals or counterproposals submitted by the parties (par. 24 above) are also pertinent, although we think reliance upon them is unnecessary. See *Owensboro-on-the-air v. F.C.C.*, 262 F.2d 702 (C.A.D.C.), cert. den. 360 U.S. 911. Accordingly, the promulgation of section 74.1107 was preceded by sufficient legal notice within the meaning of section 4(a) of the Administrative Procedure Act.

27. *Conclusion.*—Unlike the ordinary request for stay which seeks to preserve the status quo pending the outcome of a determination on the merits, a grant of the stay relief sought by petitioners would permit them and untold other CATV systems to irrevocably alter the status quo. Apart from petitioner Buckeye, it is not alleged that any of the

petitioners commenced new distant signal service in the top 100 markets between February 15 and March 17, or to date. Rather, petitioners seek a stay of section 74.1107 in order to commence new service which is not now being provided to subscribers. For the very reasons which led us to select the February 15 grandfathering date and to make section 74.1107 effective upon publication, it follows a fortiori that a stay would be unwarranted and contrary to the public interest. Indeed, in view of the much longer time period involved, the potential irreparable injury to the public would be magnified many times. By completion of the judicial review process, the operating systems in the 100 top markets would be too numerous and extensive to allow meaningful protection of the public interest through section 74.1107 even if its validity is sustained, as we believe it will be.

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28. Petitioners have not shown any substantial likelihood of prevailing on the merits of their petitions for reconsideration. Nor have they shown any irreparable injury to themselves which would outweigh the public injury in the grant of a stay. It is asserted that considerable sums have been invested in obtaining franchises, pre-operational expenses, and construction of system plants; that pole attachment rights from local utilities are affected and may be lost, as well as funds due on outstanding contractual commitments for plant equipment, performance bonds, etc.; and that franchise rights may be lost for failure to construct within time limits. But section 74.1107 does not preclude, or require a hearing for, construction or the commencement of operations limited to local signals or any other service not involving the carriage of distant broadcast signals. Nor does the section flatly prohibit the carriage of distant signals; it provides rather that "Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in full evidentiary hearing, determines that the requisite showing has been made." Since petitioners may obtain relief upon conclusion of the hearing, the mere requirement for hearing does not cause irreparable injury. *Virginia Petroleum Jobbers Assn. v. Federal Power Commission*, 259 F. 2d 921, 925 (C.A.D.C.).¹² There may well be, of course, some loss of potential subscriber fees in the interim. However, in the circumstances we cannot regard private injury of this nature as sufficient to overcome the crucial possibility of substantial irreparable injury to the public.

29. Moreover, if application of the hearing requirement of section 74.1107 would be unduly inequitable or inappropriate in the unusual situation, a waiver can be sought. Petitioners point out that because of the distances between stations in some hyphenated markets, a station may be considered a distant signal in its own market. Or a system may be required to carry the grade B signals of VHF stations in a community but be precluded, without hearing, from carrying a low-powered UHF station in the same community.¹³

¹² If the franchises impose some time limit within which distant signals must be carried, petitioners have not shown that relief cannot be obtained from the franchising authorities for a delay occasioned by factors beyond their control. As noted in par. 25 above, our April 1965 notice expressly cautioned franchise authorities as to the possibility of Commission action in this area. The Federal regulation is, in any event, controlling.

¹³ We note, however, that the community of the VHF stations may be a separate major market, thus bringing into play the considerations discussed in footnote 69 of the second report, 2 FCC 2d at 786. In other words, protection of the public interest may necessitate some appropriate temporary relief as to the VHF signals rather than waiver of the rule to permit carriage of the UHF signal without hearing.

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There may be instances, of course, where a hearing is not necessary to protect the public interest and where strict application of the rule would produce anomalous results.¹⁴ We think, nevertheless, that the criteria of section 74.1107 generally reach the situations of concern (see second report, pars. 118-127, 144; footnotes 54, 57; 2 FCC 2d at 772-777, 783). While exceptions may be made for good cause shown, this should be upon petition for waiver which will permit Commission consideration of the particular circumstances prior to the commencement of distant signal operations.

30. In sum, we think that the rules are valid and that the public interest requires that they be continued in effect. The rules cannot be simply ignored by persons who disagree or believe that an exception should be made in their instance. The proper procedure is to obtain a court stay of the effectiveness of the rules or a waiver from the Commission. Those who commence operation in violation of the rules, as a substitute for either procedure, do so at their own risk and will be responsible for any disruption to the public caused by the cease and desist and enforcement procedures which the Commission will be forced to pursue. Such operations will have to stop prior to Commission consideration of the merits and will not be taken into account in that consideration.¹⁵

31. In light of the foregoing, *It is ordered*, This 25th day of May 1966, that the petitions for stay *Are denied*.

¹⁴ We note that petitioners challenge the use of the predicted grade B contour as a measure of a distant signal. However, the use of propagation curves to measure television service contours is customary in Commission proceedings and has been judicially recognized as valid. *Wilton E. Hall and Greenville Television Co. v. F.C.C.*, 237 F. 2d 567, 573-575 (C.A.D.C.). Under the rules, the predicted grade B contour may be refuted by an adequate showing of the actual contour. The availability of signals through the use of ordinary home receiving equipment is entirely different, we believe, from the situation where signals would not be available to the public but for the use of highly sophisticated CATV equipment which may include a tall antenna structure placed on the highest elevation in the area. *Frank K. Spain d/b/a Microwave Service Co., Tupelo, Miss.*, 2 FCC 2d 903, 907-908. See also second report, footnote 63, 2 FCC 2d at 783.

¹⁵ For these reasons, and those set forth in our order of Apr. 27, 1966, in docket No. 16551, Buckeye's petition for stay of the effectiveness of the rules pending final orders determining their validity and its petition for waiver (file No. CATV 100-5) will be denied. See also FCC 66-449 and FCC 66-453, adopted this day.

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DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. I would grant the petitioners' requests to stay the effectiveness of the Commission's CATV rules pending action on their petitions for reconsideration, until final adjudication of appeals from the second report and order, or action by Congress, whichever should occur first.

I disagree with the Commission's finding that there is little likelihood of petitioners' prevailing.

There are presently six bills pending in Congress with respect to regulation of CATV, H.R. 7715, H.R. 12914, H.R. 13286, H.R. 14201, H.R. 14454, and S. 3017. Hearings have been held on four of these

bills by the House Interstate and Foreign Commerce Committee (H.R. 7715, H.R. 12914, H.R. 13286, and H.R. 14201).

I believe it is unsound to second-guess the Congress, and now conclude that no changes will be made in the Commission's proposed bill, H.R. 13286. With substantive changes or enactment of a different bill, the Commission's present CATV rules could be nullified.

Moreover, in face of serious questions as to the Commission's having jurisdiction over CATV and validity of the rules recently promulgated, there is no certainty that the rules will be upheld in pending court appeals.

In my opinion, the Commission does not presently have jurisdiction over CATV and, consequently, the rules are invalid for this and other reasons set forth in my dissent to the Commission's decision in docket No. 16551, which dissent is incorporated herein by reference and attached hereto.

I vote to stay the effective date of the rules until their validity has been finally adjudicated by the courts or until Congress has enacted CATV legislation.

* * *

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FCC 66-449

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	} Docket No. 16551
CEASE AND DESIST ORDER TO BE DIRECTED	
AGAINST BUCKEYE CABLEVISION, INC.,	
OWNER AND OPERATOR OF A COMMUNITY	
ANTENNA TELEVISION SYSTEM AT TOLEDO,	
OHIO	

APPEARANCES

Robert A. Marmet and Edwin R. Schneider, Jr. (Marmet and Schneider), and *William P. Sims, Jr.* (Dow, Lohnes, and Albertson), on behalf of Buckeye Cablevision, Inc.; *Thomas B. Fitzpatrick* and *Anthony J. Sobczak*, on behalf of the Broadcast Bureau; *Bernard Koteen* and *Alan Y. Naftalin* (Koteen and Burt), and *Warren C. Zwicky* on behalf of Storer Broadcasting Co.; and *Peter Shuebruk* and *Herbert M. Schulkind* (Fly, Shuebruk, Blume, and Gaguine) on behalf of D. H. Overmyer.

DECISION

(Adopted May 25, 1966)

COMMISSIONER COX FOR THE COMMISSION; COMMISSIONER BARTLEY
DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER
ABSENT.

1. By an order to show cause, FCC 66-273, released March 25, 1966, the Commission directed that Buckeye Cablevision, Inc. (Buckeye), show cause why it should not be ordered to cease and desist from further operation of a community antenna television system (CATV) in Toledo, Ohio, in violation of section 74.1107 of the Commission's rules. Since expeditious resolution of the matter was deemed essential, the Commission further ordered that the hearing commence on April 28, 1966, that immediately after closing the record it be certified to the Commission for final decision, and that the parties file their proposed findings of fact and conclusions of law within 7 days after the date the record is closed.

2. Prehearing conferences were held on April 19 and 25, 1966. At the April 25, 1966, prehearing conference, the hearing examiner granted petitions to intervene filed by D. H. Overmyer, permittee of television station WDHO-TV on channel 24, and by Storer Broadcasting Co., licensee

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of television station WSPD-TV on channel 13, both in Toledo; and his rulings were subsequently formalized in an order, FCC 66M-601, released April 29, 1966. The evidentiary hearing commenced on April 28, 1966, and the record was closed on that date.¹ Pursuant to the mandate contained in the order to show cause, the hearing examiner certified the record to the Commission by order, FCC 66M-603, released April 29, 1966. On May 5, 1966, Buckeye, Storer, Overmyer, and the Broadcast Bureau each filed proposed findings of fact and conclusions of law. In addition, Buckeye filed a brief in support of its contentions.

3. By the Commission's second report and order in dockets Nos. 14895, 15233, and 15971, released March 8, 1966,² rules were adopted for the regulation of all CATV systems. These rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540), and section 74.1107, the apparent violation of which prompted this show cause proceeding, was made effective immediately upon publication. The provisions of section 74.1107 in pertinent part are as follows:

(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and

¹ By order, FCC 66M-607, released Apr. 29, 1966, the hearing examiner corrected the transcript of hearing in certain respects.

² FCC 66-220, 2 F.C.C. 2d 725.

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interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * * * *

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary issued on or before that date; * * *).

4. The essential facts in this case are not in dispute. Buckeye owns and operates a facility which receives the signals of several television stations at its antenna tower, transmits the signals to electronic equipment located at the base of the tower, and then amplifies and distributes such signals over a coaxial cable to its subscribers in Toledo, Ohio. For engineering purposes, Buckeye divided the greater Toledo area into 10 segments, of which only 1 segment, located entirely within the city limits, had been completely wired at the time of the hearing. For the privilege of receiving those signals the subscribers pay an installation charge and a monthly service charge. The CATV serves more than 50 subscribers, and such service is not limited to the residents of one or more apartment dwellings. At present, service is rendered to approximately 1,200 subscribers.

5. Commencing on March 16, 1966, the customers of the Toledo CATV system received the television signals of Toledo commercial stations WTOL-TV on channel 11 and WSPD-TV on channel 13, and educational station WGTE-TV on channel 30; Detroit, Mich., commercial stations WJBK-TV on channel 2, WWJ-TV on channel 4, WXYZ-TV on channel 7, and WKBD on channel 50; Lansing, Mich., station WJIM-TV on channel 6; and Windsor, Ontario, station CKLW-TV on channel 9.³ The signals of the Detroit station on channel 2 and the Toledo educational station on channel 30 are carried on an alternating basis. Of the foregoing stations, we are concerned here with WJIM-TV (Lansing) and WKBD (Detroit).⁴ The

³ In addition, Buckeye provides a weather service channel to its subscribers. We have been informed that station WDHO-TV, Toledo, commenced operation on May 3, 1966, and, presumably, that station is also being carried in accordance with our rules.

⁴ Toledo is approximately 90 miles from Lansing and 55 miles from Detroit.

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predicted grade B contour of station WJIM-TV falls approximately 5 miles short of reaching the city limits of Toledo. With respect to WKBD, the predicted grade B contour just penetrates the city limits of Toledo in a narrow peninsula at the northern end of the city. Section 74.1103 of our rules requires a CATV system to carry, within the limits of its channel capacity, all stations "within whose grade B contours the system operates, *in whole or in part*" [emphasis supplied].⁵ In the circumstances, carriage of WKBD is permissible, and is required upon request, with any public interest questions presented by such carriage to be determined in connection with the overall Toledo-Detroit question raised by the Overmyer petition (see par. 16, *infra*). It follows that our concern in this proceeding is really limited to the carriage of the Lansing station, WJIM-TV. As to that station, the grade B con-

tour was established in accordance with the calculations prescribed in section 73.684 of the rules.⁶ Buckeye contends, however, that in determining such contours for the purpose of this proceeding, at least one radial is required to pass through Toledo and that this was not done in the exhibit upon which the Broadcast Bureau relies. Section 73.684(d) requires that eight radials be utilized and that at least one pass through the principal community to be served. However, there is no requirement in the rule that a radial pass through a community other than the principal community.

6. Toledo is ranked as the 26th television market by the American Research Bureau (ARB),⁷ and the community is within the predicted grade A contours of the Toledo television stations heretofore enumerated. In the segment of Toledo where CATV wiring has been completed, the signals received by the CATV subscribers include those of television station WJIM-TV.

7. At no time prior to the commencement of operations in Toledo did Buckeye request permission to extend the signal of WJIM-TV beyond its grade B contour, and at no time has such permission been granted by the Commission. The critical, and only, issue herein presented is whether the foregoing facts require the issuance of an order directing Buckeye to cease and desist from further operation of its Toledo CATV system in violation of the rules.

⁶ See also *Teleprompter Transmission of Kansas, Inc.*, 2 F.C.C. 2d 312 (1966).

⁷ In note 1 to sec. 74.1105 of the rules, which also relates to the extension of the signal of a television station beyond the grade B contour of the station, we stated that sec. 73.684 should govern the determination of the grade B contour.

⁸ The market ranking is based on the net weekly circulation for 1965.

3 F.C.C. 2d

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8. Buckeye does not seriously question the foregoing facts but it does challenge the validity of the proceeding on substantive and procedural grounds. First, Buckeye contends that the Commission has no jurisdiction over CATV systems and that the rules adopted in the second report and order are consequently invalid. No detailed discussion of this contention was advanced by Buckeye, since it recognized that "this controversy will [not] be resolved in the instant proceeding," and we deem it sufficient to rely upon paragraphs 10 through 19 of the second report and order (2 F.C.C. 2d at 729-734) and upon our memorandum of law on this subject attached thereto (app. C, 2 F.C.C. 2d at 793). Neither do we believe that any extended comment is necessary concerning Buckeye's challenge to the validity of the February 15, 1966, date specified in the grandfathering provisions of section 74.1107(d) or to the use of ARB rankings. These matters have been discussed in the second report and order (2 F.C.C. 2d at 782-785, pars. 141-148) and in our memorandum opinion and order issued this day on the petitions for stay of that report (FCC 66-455), and no purpose would be served by repeating our views here.

9. Next, Buckeye contends that the expedited hearing procedure included in our order to show cause, wherein we directed the examiner to certify the record to the Commission for final decision, is unlawful and deprives Buckeye of valuable procedural rights. This contention must be rejected since the procedure is specifically authorized by section 409(a) of the Communications Act of 1934, as amended, and its use in this proceeding was manifestly proper. *RCA Communications, Inc. v. Federal Communications Commission*, 99 U.S. App. D.C. 163, 238 F. 2d 24 (1956), cert. denied 352 U.S. 1004; *American Colonial*

Broadcasting Corp., 1 F.C.C. 2d 1464, released December 3, 1965. Buckeye was accorded the full 30-day period provided by section 312(c) of the act within which to prepare for hearing, and the record was not closed until Buckeye had indicated on the record that it intended to introduce no evidence on the one issue before the examiner, namely, compliance with section 74.1107 of the rules.⁸ Only if no adequate basis existed for the Commission's finding of need for expedition may Buckeye prevail on its claim that an initial decision by the examiner and an opportunity to file exceptions to such initial decision are essential. In this connection we note our policy declarations in the second report and order, 2 F.C.C. 2d at 781 (pars. 139, 140), concerning the entry of CATV into the major markets wherein we stated:

* Counsel contended that the hearing encompassed issues other than compliance with the rules, and he requested an opportunity to introduce evidence "concerning the broad scope of this proceeding." The examiner properly denied this request.

3 F.C.C. 2d

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139. * * * And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programming not otherwise available or, what is more likely, bringing in programming locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

140. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that the policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

10. The top 100 markets were selected "for special attention because it is in these markets that UHF stations or wire pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute." It was felt that any delay in the

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commencement of CATV service because of the necessity for an evidentiary hearing "is mitigated by the consideration that these markets generally have a considerable amount of presently available and com-

prospective new service"; and finally because such markets "include roughly 90 percent of the television homes in this country" (2 F.C.C. 2d at 783, par. 144). It was in the light of the foregoing policy considerations that we considered the need for expeditious adjudication in this proceeding. At the time the order to show cause was adopted, the information before the Commission indicated that Buckeye had commenced operation of a CATV system in one of the top 100 television markets after February 15, 1966, and that the CATV was extending the signals of certain stations beyond their grade B contours by transmitting such signals to its subscribers without first requesting or obtaining Commission permission. Buckeye gave no indication that it would voluntarily cease the proscribed operation until Commission consent was obtained. On the contrary, it appeared that Buckeye intended to expand service into additional sections of the Toledo metropolitan area as soon as the wiring and other preliminary work in such areas could be completed. We could not permit this case to go through the regular hearing process of initial decision and exceptions prior to Commission review and accomplish our objective of preventing a cable system carrying distant signals from becoming established or well entrenched before taking effective action. Under the circumstances, we found that due and timely execution of our functions imperatively and unavoidably required that the record be certified to the Commission for final decision, and upon the basis of our review of this finding in the light of the facts developed at the evidentiary hearing, we adhere to that determination.⁹

11. Buckeye's contention that the deletion of one sentence from the order to show cause by our order, FCC 66-373, released April 27, 1966, entitled it to an additional 30-day period to prepare for hearing must be rejected since the scope of the hearing remained unchanged. In the order to show cause we specifically stated that "there is only one issue to be resolved, i.e., compliance with the rule." On the day that

⁹ In a pleading filed Apr. 18, 1966, Buckeye asserted that it "must and will resist an order to cease its operation with every legal resource at its command," and that "Buckeye cannot comply with an order issued pursuant to rules of questionable legality until those rules have been tested in the judicial process." While we do not question Buckeye's right to pursue its administrative and judicial remedies, we do believe that its comment emphasizes the need for bringing this proceeding to a conclusion as expeditiously as possible consistent with the requirements of due process.

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the said order was adopted, Buckeye filed a pleading which contained a request for a waiver of the rule, and our order of April 27, 1966, simply made it clear that only the one issue would be considered in the show cause proceeding.¹⁰

12. In an appeal filed on May 6, 1966,¹¹ Buckeye asserts that it was denied due process because petitions by D. H. Overmyer, permittee of WDHO-TV on channel 24, and Storer Broadcasting Co., licensee of WSPD-TV on channel 13, both in Toledo, for intervention as parties were granted by the examiner prior to the expiration of the period for filing oppositions.¹² For the reasons set forth above, the public interest required that the hearing on the order to show cause proceed without undue delay, and the examiner's action was clearly in

¹⁰ The offer of proof attached as an appendix to Buckeye's proposed findings of fact and conclusions of law is directed to matters which are not pertinent to the one issue in this proceeding, and the offer must therefore be rejected. It would be contrary to the public interest to prolong this show cause proceeding by permitting the introduction of evidence looking to a waiver of the rules while Buckeye persists in the operation of its CATV system in violation of the rules. Indeed, were we to do so, we would subvert the thrust of sec. 74.1107, since instead of a hearing prior to the initiation of service, we

would appear to be inviting CATV systems to commence operation in violation of the section and have a hearing on the waiver request, as a part of the cease and desist proceeding. For the reasons stated in pars. 9 and 10, we believe that such a procedure would not serve the public interest.

¹¹ The appeal was addressed to the Review Board. However, by order, FCC 66R-188, released May 13, 1966, the Review Board certified the pleading to the Commission pursuant to the provisions of sec. 1.291(a)(1) of the rules since the record had been certified to the Commission by the hearing examiner. Oppositions to the appeal were filed on May 12, 1966, by Overmyer, on May 13, 1966, by the Broadcast Bureau, and on May 16, 1966, by Storer. A reply to oppositions was filed on May 23, 1966, by Buckeye.

¹² The petitions were filed by Overmyer on Apr. 13 and by Storer on Apr. 15, 1966, and oppositions were due on Apr. 26 and Apr. 28, 1966, respectively. The examiner granted the petitions at a prehearing conference on Apr. 25, 1966, and he formalized his ruling by a written order, FCC 66M-601, released Apr. 29, 1966. On Apr. 26, 1966, Buckeye filed a petition for reconsideration of the examiner's oral ruling, but the examiner dismissed the petition by order, FCC 66M-600, released Apr. 29, 1966, because authorization for its filing had not been obtained from the presiding officer as required by sec. 1.303 of the rules.

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accord with the provisions of section 1.298 of the rules.¹³ Moreover, both Overmyer and Storer were entitled to intervention as parties in interest, and Buckeye was not prejudiced because it was not accorded the full period for filing oppositions. We find that the examiner acted properly under the circumstances, and his ruling is affirmed.

13. Pleadings filed by Buckeye contain requests for reconsideration of the order to show cause, for a stay of the proceedings, for a waiver of the rules, and for other relief.¹⁴ We have given careful consideration to the allegations therein contained and to those of the responsive pleadings.¹⁵ However, for the reasons set forth in our order, FCC 66-373, released April 27, 1966, and in this decision, we conclude that all these requests for relief must be denied. In addition, Buckeye, on April 18, 1966, filed with the Review Board a petition to clarify or enlarge issues, with a request that the matter be certified to the Commission,¹⁶ and by an order, FCC 66R-174, released May 5, 1966, the Review Board certified the petition to the Commission. To a large extent, the pleading merely reiterates Buckeye's challenge to the validity of the rules governing the operation of CATV systems and its requests for relief, the only difference being that the allegations are framed in the form of issues. The remaining requests for enlargement of issues relate to matters which might be pertinent to an evidentiary hearing on a request for a waiver of the rules. However, as we have previously stated, we have no intention of permitting Buckeye to prolong this adjudicatory proceeding by broadening the scope of the hearing to include consideration of a request for waiver while the CATV

¹³ The rule provides in pertinent part that: "Unless it is found * * * that the public interest requires otherwise, * * * consideration of interlocutory requests will be withheld until the time for filing oppositions (and replies, if replies are allowed) has expired."

¹⁴ These pleadings consist of the following: A petition for declaratory ruling, for waiver or other appropriate relief, filed Mar. 25, 1966; a petition for reconsideration and consolidation, filed Apr. 18, 1966; and a petition for stay, filed Apr. 19, 1966.

¹⁵ Oppositions to the petition for reconsideration were filed on May 2, 1966, by Overmyer, and on May 3, 1966, by Storer and by the Broadcast Bureau. A reply to such oppositions was filed on May 13, 1966, by Buckeye. Oppositions to the petition for stay were filed on Apr. 27, 1966, by Storer and on Apr. 28, 1966, by Overmyer; and a reply to these oppositions was filed by Buckeye on May 3, 1966.

¹⁶ Oppositions were filed on Apr. 29, 1966, by Overmyer, and on May 3, 1966, by Storer and by the Broadcast Bureau. A reply to the oppositions was filed on May 12, 1966, by Buckeye.

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system continues to be operated in violation of our rules. Once compliance has been achieved, we would generally then proceed to consider the contentions advanced to justify the waiver sought, together with the arguments in opposition to this request.¹⁷ However, until we can get to final disposition of the merits of the public interest question involved, it is imperative that Buckeye, and others similarly situated, comply fully with our rules so that the public will not be led to rely on a service which we may ultimately find not to be in the public interest.

14. On May 5, 1966, Buckeye requested an opportunity to present oral argument to the Commission before a decision is issued in this case. The basic facts are relatively simple and they are not disputed. With respect to the legal issues, extensive briefs have been submitted in both the rulemaking proceeding and in this proceeding and, in such briefs, the parties have fully set forth their legal arguments. We see no useful purpose in having oral argument and Buckeye's request is therefore denied.

15. The record in this proceeding establishes that the facility which Buckeye owns and operates in Toledo, Ohio, is a community antenna television system as defined by section 74.1101(a), and it is therefore subject to the rules adopted as an appendix to the second report and order for the regulation of CATV systems. The record also establishes that Buckeye's CATV system operates within the grade A contours of television broadcast stations in Toledo, which is the 26th largest television market; that the said system commenced operation after February 15, 1966; that since March 16, 1966, the CATV system has distributed to its subscribers the signals of certain television stations including the signal of television station WJIM-TV, Lansing; and that the said CATV system has extended the signal of the aforementioned station beyond its grade B contour without requesting and obtaining Commission approval. On the basis of the foregoing, we conclude that Buckeye is operating its CATV system in Toledo, Ohio, in violation of section 74.1107 of the rules and section 312(b) of the Communications Act of 1934, as amended. We further conclude that the public interest requires the issuance of an order directing Buckeye to cease and desist promptly from such unlawful operation.¹⁸

¹⁷ In this respect, see our memorandum opinion and order adopted this day, FCC 66-456.

¹⁸ Sec. 502 of the Communications Act provides as follows: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs."

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16. One additional matter must be considered in this proceeding. On April 29, 1966, Overmyer filed a petition requesting that any cease and desist order issued against Buckeye be broadened to include a prohibition against the carriage of the signals of certain stations even though such stations provide Toledo with a predicted grade B signal. Consideration of Overmyer's request in this proceeding would, in our view, be inappropriate. Compliance with the rules by Buckeye is the critical issue in this proceeding, and the public interest requires the resolution of that issue as expeditiously as possible. For this reason we must deny Overmyer's petition to enlarge the scope of this hearing to include consideration of its request for special relief. However, the

petition will receive our attention in a separate action, and disposition thereof will be made by a separate order.

17. In sum, we believe that the issue in this case, while narrow, is of great importance, since it involves the validity of our major market, distant signal policy embodied in section 74.1107. Buckeye, in carrying the signal of Lansing station WJIM-TV beyond its grade B contour into Toledo, without having made the showing referred to in section 74.1107 and obtained the requisite Commission approval, is operating in clear violation of that section. The issue presented is thus whether CATV systems such as Buckeye may bring in such distant signals—today from Lansing, tomorrow from Cleveland, Chicago, or other major cities—without regard to the provisions of our regulations. To condone such activity by CATV systems would wholly frustrate orderly consideration of the very important public interest questions presented in this vital field.

18. Finally, we note Buckeye's assertion that it intends to contest the validity of our action with all legal means at its disposal. See footnote 9. It has, of course, a full right to seek review of our action under section 402(b)(7) and to request a stay of this order. We have, for this reason, devised the following timetable: Buckeye must comply with this cease and desist order within 2 days, unless it notifies the Commission during that 2-day period that it intends to seek judicial review of the order; in that event, Buckeye is afforded an additional 14-day period in which to file its appeal and seek a stay of the order.

19. Accordingly, *It is ordered*. This 25th day of May 1966, that within 2 days after the release of this decision Buckeye Cablevision, Inc., *Cease and desist* from the operation of its community antenna television system at Toledo, Ohio, in such a way as to extend the signals of television broadcast stations beyond their grade B contours in violation of section 74.1107 of the Commission's rules, and specifically to cease and desist from supplying to its subscribers the signal of station WJIM-TV, Lansing, Mich.; provided, however, that if Buckeye notifies the Commission during the said 2-day period that it intends to seek judicial review of this order, Buckeye is afforded an additional 14-day period in which to file an appeal and to seek a stay of the order; and

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20. *It is further ordered*. That the request for oral argument filed on May 5, 1966, by Buckeye Cablevision, Inc., *Is denied*; and

21. *It is further ordered*. That the petition to clarify or enlarge issues, filed on April 18, 1966, by Buckeye Cablevision, Inc., *Is denied*; and

22. *It is further ordered*. That the appeal from the adverse ruling of the hearing examiner filed on May 6, 1966, by Buckeye Cablevision, Inc., granting petitions for intervention, *Is denied*; and

23. *It is further ordered*. That the several requests for relief contained in the pleadings filed by Buckeye Cablevision, Inc., in all respects *Are denied*; and

24. *It is further ordered*. That the petition filed on April 29, 1966, by D. H. Overmyer to include in this proceeding consideration of its request for special relief *Is denied*, but that the said petition will be considered in a separate proceeding, and disposition thereof will be made by a separate order.

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DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming *arguendo* that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit rather than injury to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

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A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rule-making without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of BUCKEYE CABLEVISION, INC., TOLEDO, OHIO Petition for Declaratory Ruling, for Waiver or Other Appropriate Relief	}	File No. CATV 100-5
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MEMORANDUM OPINION AND ORDER

(Adopted May 25, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING
A STATEMENT; COMMISSIONER LOEVINGER ABSENT.

1. The Commission has under consideration a petition for declaratory ruling, for waiver or other appropriate relief filed March 25, 1966, pursuant to section 74.1107 of the rules, by Buckeye Cablevision, Inc. (Buckeye), the owner and operator of a community antenna television system (CATV) at Toledo, Ohio. Buckeye seeks a declaratory ruling that its Toledo operations conform to all valid Federal Regulations; or, in the alternative, a waiver of any rules or regulations necessary for such operations and program distribution, immediate consideration and action on its petition, and oral argument unless the relief prayed for is expeditiously granted. Oppositions to the Buckeye petition were filed by D. H. Overmyer, permittee of UHF station WDHO-TV, channel 24, Toledo; Storer Broadcasting Co., licensee of station WSPD-TV, Toledo; and Edward Lamb Enterprises, Inc., and Woodruff, Inc.,¹ Kaiser Broadcasting Co., permittee of station WKBD-TV, Detroit, Mich., filed a statement supporting the petition insofar as it seeks permission to carry the signal of WKBD-TV on the Toledo CATV system. Buckeye filed a reply on May 20, 1966.

2. The pertinent background is as follows: On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rule-making in docket No. 15971 (30 F.R. 6078), proposing, inter alia, the adoption of a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with four or more commercial channel assignments and three or more stations in operation and one or more stations authorized or applied for, without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development and maintenance of independent UHF service in the community (30 F.R. at 6085). It was further proposed that a like prior showing be required before a CATV system could bring a television signal beyond

¹ Although Buckeye challenges the standing of Edward Lamb Enterprises, Inc., and Woodruff, Inc., we do not rule on this issue in view of our determination as to the merits of the Buckeye petition.

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the grade B contour into a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation (*ibid.*). The notice expressly put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not, and stated the Commission's belief that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration (30 F.R. at 6085, 6087).

3. On May 17, 1965, the council of the city of Toledo adopted an ordinance granting to Buckeye the nonexclusive right for a period of 20 years to construct and operate a CATV system in that city. Toledo then had three commercial channel assignments, with two VHF stations in operation and a third UHF commercial station authorized, and was within the grade B contour of three or more commercial stations in Detroit, Mich. On June 8, 1965, the Commission issued its fourth report and order in Docket No. 14229 (30 F.R. 7711), revising the table of television channel assignments contained in section 73.606 (b) of the rules. Under the revised table, Toledo is assigned five commercial channels, three of which are UHF.²

4. On February 15, 1966, the Commission issued a public notice (public notice No. 79927), announcing that it had agreed on a plan for CATV regulation which would be contained in rules shortly to be issued. The public notice stated that under the new rules, parties who obtain State or local franchises to operate CATV systems within the grade A contour of stations in the 100 highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their grade B contours, will be required to undergo evidentiary hearing and obtain FCC approval before CATV service to subscribers may be commenced. It was further stated that this requirement would apply to all CATV operations commenced after February 15, 1966. On March 8, 1966, the Commission released its second report and order in dockets Nos. 14895, 15233, and 15971, promulgating the CATV rules and making section 74.1107, which embodies the foregoing evidentiary hearing requirement, effective immediately upon publication in the Federal Register (31 F.R. 4540). By a concurrently issued public notice (public notice No. 80850), the Commission announced that publication in the Federal Register would occur on March 17, 1966.

5. The Buckeye CATV system commenced operation in part of Toledo on March 16, 1966,³ making available to subscribers the signals of Toledo television stations WTOL-TV, WSPD-TV, and WGTE (an educational station); stations WJBK-TV, WWJ-TV, WXYZ-

² Although this table of assignments was further revised by the fifth report and order in docket No. 14229, issued on Feb. 11, 1966 (31 F.R. 2932), the five commercial assignments to Toledo were not changed.

³ According to Storer Broadcasting Co. (opposition to petition, p. 5), the Apr. 4, 1966, issue of "Cable Television Review" states: "As reported in last week's issue of the 'Review,' Buckeye * * * had raced the clock prior to the Mar. 17 FCC report and order deadline and was delivering signals to 52 homes 8 hours before the 17th."

TV, and WKBD-TV of Detroit, Mich.; WJIM-TV of Lansing, Mich.; and CKLW-TV of Windsor, Ontario. In addition, Buckeye provides a weather service channel to its subscribers and is presumably now carrying Toledo station WDHO-TV, since that station commenced operation on May 3, 1966 (Buckeye petition, p. 6). Toledo is ranked as the 26th television market by American Research Bureau and is within the predicted grade A contour of the four Toledo stations. Except for Detroit station WKBD and Lansing station WJIM, there is no question but that all other signals now carried on the CATV system are within the predicted grade B contours of the stations involved. The present request for relief goes only to WKBD and WJIM.⁴

6. On March 25, 1966, the Commission issued an order to show cause in docket No. 16551 (FCC 66-273), directing Buckeye to show cause why it should not be ordered to cease and desist from further operation in violation of section 74.1107 of the Commission's rules. It was alleged that Buckeye's operations violated section 74.1107 by extending the signals of WKBD and WJIM beyond the grade B contour of those stations after March 17, 1966, without the prior evidentiary hearing and Commission approval required by section 74.1107. Following an evidentiary hearing, the Commission adopted its decision in docket No. 16551 on May 25, 1966 (FCC 66-449). No violation was found as to WKBD since the hearing record established that this station places a grade B signal over part of Toledo. Finding, however, that no part of the predicted grade B contour of WJIM reaches the city limits of Toledo,⁵ the Commission ordered Buckeye to cease and desist from supplying to its subscribers the signal of WJIM in violation of section 74.1107 of the rules. The order affords Buckeye 2 days within which to comply, provided, however, that if Buckeye notifies the Commission during this 2-day period that it intends to seek judicial review of the cease-and-desist order, Buckeye is afforded an additional 14-day period in which to file an appeal and seek a stay.

7. The disposition of docket No. 16551 renders moot those portions of the Buckeye petition which request relief as to WKBD,⁶ and a declaratory ruling that carriage of WJIM conforms to section 74.1107 of the rules. There remains for consideration Buckeye's request for a waiver of section 74.1107 to permit carriage of WJIM without evidentiary hearing.

8. We think that the request for waiver must be denied. In the first place, we would not grant a waiver of section 74.1107 while a system

⁴ A Cleveland station has been carried on the system, but this service was suspended for technical and other reasons and is not part of this request for relief (Buckeye petition, p. 5, note 2). Nor does the petition request relief as to station WGN-TV, Chicago, though we note that Buckeye's affiliated Video Service Co. has an application pending before us for microwave facilities to bring the signal of WGN to the Toledo CATV system (File No. 6476-83-C1-P-65). Contrary to Buckeye's assumption, section 74.1103 of the rules does not require carriage of CKLW-TV upon request of that station, since it is not a U.S. station.

⁵ The Commission found that Lansing is approximately 90 miles from Toledo and the predicted grade B contour of WJIM falls approximately 5 miles short of the city limits of Toledo.

⁶ In docket No. 16551 we denied a petition by D. H. Overmyer which requested that Buckeye be prohibited in that proceeding from carrying any of the Detroit-Windsor stations, but stated that consideration of the Overmyer request for special relief would be afforded in a separate action. Our action here is without prejudice to any action which may be taken on the request for special relief.

was operating in violation of that section. Ordinarily, we would not even consider the merits of a request for waiver until the violation had ceased. To condone such a procedure would undercut the very premise of section 74.1107, that the public interest requires Commission consideration of new distant signal operations in major markets before they are commenced, and would encourage other persons to violate the rule while seeking relief before the Commission. Moreover, it would be manifestly unfair to persons who have sought a waiver or evidentiary hearing while deferring distant signal operations in compliance with the rule. Further, there would be an unfair delay in processing such petitions for waiver by those in compliance with the rule. Accordingly, we shall follow a course of promptly considering petitions for waiver by persons who are deferring distant signal operations in compliance with the rule, and of not considering requests for waiver by persons operating in violation of section 74.1107 until the violation has ceased. Upon such cessation, the request for waiver will be placed on the processing line. Since this procedure was not previously made expressly clear, we have considered the Buckeye request for waiver on the merits. We conclude that it should be denied.

9. In support of its request for waiver Buckeye asserts, first, that it is equitably entitled to relief because it has invested more than \$500,000 in the Toledo system; is committed to Ohio Bell Telephone Co. for additional payment of \$777,000 for installation of coaxial cable, plus monthly payments that will total over \$5 million during the next 10 years; and its current operations are the minimum service Buckeye can render without substantial and irreparable injury. Buckeye assumes, *arguendo*, the validity of the substantive provisions of the CATV rules for purposes of seeking relief, without prejudice to the challenges made in its petition for reconsideration and petition for stay (petition for waiver, p. 2). However, it incorporates the challenges there made to the legal sufficiency of the notice of proposed rulemaking, the effective date of section 74.1107, and the grandfathering provision, as a further claimed basis for equitable relief.

10. For the reasons set forth in the second report and in the memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, denying the petitions for stay (FCC 66-456), we do not accept these contentions. We recognized in the second report that section 74.1107 with its February 15, 1966, grandfathering date might catch some systems just prior to the commencement of operations (second report, 2 FCC 2d 725, at 784, note 65). We stated (*ibid.*):

But this will always be true in the case of any policy, and in any event, if the policy is to be effective and achieve the above-described goals, it must be implemented immediately. We also point out that parties have known of the Commission's proposal for major market procedure since April 23, 1965 (and of the counter-proposals since July 26, 1965). The notice expressly " * * * put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (notice, par. 65.1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.

This is not such an unusual case. Buckeye did not receive its Toledo franchise until after the notice of proposed rulemaking was published

in the Federal Register and the notice was placed in the record of the Toledo proceedings (Storer opposition to petition, p. 5). Toledo clearly fell within the scope of the rule proposed in paragraphs 49 and 50 of the notice as a community overshadowed by three or more grade B signals from Detroit (par. 2, *supra*). Moreover, Buckeye has been on Federal Register notice since June 1965 (fourth report and order in docket No. 14229, 30 F.R. 7711), that Toledo also fell within the scope of the proposed rule as a community with four or more commercial channel assignments, two commercial stations in operation and a third authorized. Under the circumstances, Buckeye clearly proceeded at its own risk in making financial commitments for Toledo CATV operations whose success allegedly depends on signals carried beyond the grade B contour without prior hearing.⁷

11. As a further ground for waiver, Buckeye urges that it is operating substantially in compliance with section 74.1107 because the predicted grade B contour of WJIM falls only a few miles short of Toledo and the signal is allegedly available off-the-air in Toledo on many standard rooftop antennas. But we chose the predicted grade B contour as the line at which signal importation raises serious public interest questions requiring evidentiary hearing.⁸ While the drawing of any line will always exclude some who are close to the line, the grade B contour is a definitive and reasonable cut-off point. If we were to substitute a standard of substantial compliance, and grant waivers solely because the signal to be carried is only a few miles beyond the grade B contour, the door would be opened to requests for waivers to carry other slightly more distant signals without hearing on the ground that their predicted grade B contours are just a little farther away. The grade B contours of the Cleveland stations are only a few miles farther than that of WJIM and we note that Buckeye at one time carried one of the Cleveland signals. That the next step might well be Chicago is indicated by the pending application for microwave facilities to bring WGN to Toledo.⁹ Such piecemeal nibbling would substantially undercut the purpose of the rule and destroy any semblance of a definite standard.

12. Buckeye does not attempt to distinguish the Lansing, Mich., station from any other distant signal in terms of having any special community of interest with Toledo, Ohio. Apart from the few miles argument, Buckeye alleges only that the WJIM signal is available in Toledo on many standard rooftop antennas. But we cannot accept a bare allegation of this nature without supporting evidence. We note, for example, that ARB television coverage, which lists stations having 5 percent or more coverage in a county, does not list WJIM-TV in Lucas County, in which Toledo is located. While this, of course, does not resolve the factual issue contrary to Buckeye's allegation, it is a further indication that the matter is clearly one to be explored by the evidentiary hearing process.

⁷ No showing is made as to the extent of injury Buckeye would suffer if 1 of the 10 signals carried on the cable were suspended pending evidentiary hearing as to the public interest questions. Thus, in this respect also, the request for immediate relief is deficient.

⁸ We indicated, however, that signals carried within the grade B contour might be subject to an evidentiary hearing upon petition for special relief, if the stations were located in a separate major market (second report, 2 FCC 2d at 786, footnote 69).

⁹ Buckeye indicates that it may, from time to time, add or drop available off-the-air channels, including alleged distant signals (reply, p. 4).

13. Buckeye's remaining two asserted grounds for waiver also raise matters appropriate for resolution in evidentiary hearing. It is asserted next that there is no probative evidence that CATV in Toledo will adversely affect UHF development in that city and that Buckeye's system will in fact materially assist the new UHF station WDHO-TV on channel 24 and the proposed station on channel 54¹⁰ by carrying their signals to its subscribers. But the short answer is that there is no probative evidence before us that the importation of distant signals like WJIM-TV will not, on an overall basis and thus taking into account any early assistance to local UHF through carriage, adversely affect the development and maintenance of UHF service in Toledo. D. H. Overmyer, permittee of WDHO-TV, has filed in opposition to the request for waiver, urging that a hearing is necessary. WDHO is a new UHF station in a two-VHF market, overshadowed by Detroit network-affiliated stations now being carried on the cable, and any station on channel 54 would be independent in operation. That Buckeye will comply with the nonduplication rules will afford virtually no relief from fragmentation of the limited audience interested in viewing nonnetwork programming. In sum, there is no evidence before us on the public interest questions of concern discussed in our second report (pars. 118-127; 131-138), and that is precisely why we think that evidentiary hearing is required.

14. And, finally, with respect to the pay-TV question (second report, pars. 128, 129), Buckeye states only that it has no present plans to provide any programs to its Toledo subscribers on a per program basis (petition, p. 12; emphasis supplied). We do not think that such a statement provides sufficient information on the question of program origination, or adequately suffices for the thorough exploration of the relationship, if any, of proposed CATV operations in major markets and the development of pay television in that market, contemplated by the second report (pars. 129, 130). This aspect, too, should be explored in evidentiary hearing.

15. In sum, we conclude that the public interest would be served by denial of Buckeye's request for waiver of the evidentiary hearing requirement of section 74.1107 with respect to WJIM-TV. In view of the circumstances discussed in par. 8 above, we will treat the petition for waiver as a request for evidentiary hearing and permit Buckeye to retain its present place as fifth in the processing line. This matter will be designated for hearing in proper course and we will at the same time rule on the petition for special relief filed on April 29, 1966, by D. H. Overmyer.

16. Accordingly, *It is ordered*, This 25th day of May 1966, that the petition for declaratory ruling, for waiver or other appropriate relief filed on March 25, 1966, by Buckeye Cablevision, Inc., *is denied*, but that said petition will be treated as a request for evidentiary hearing and will be designated for hearing in normal course.

¹⁰ Rust Craft Broadcasting Co. has an application pending for Toledo channel 54 (File No. BPCT-3666).

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I would grant Buckeye's petition for declaratory ruling that its Toledo operations do not contravene any valid Federal regulations. I agree with the petitioner that the Commission does not presently have lawful jurisdiction over CATV and that, consequently, the rules promulgated in the Commission's second report and order are invalid. Moreover, I believe that section 74.1107 is invalid for other reasons set forth in my dissent this day to the Commission's decision in docket No. 16551, FCC 66-449, which dissent is incorporated herein by reference and attached hereto.

With a grant of the petition for declaratory ruling, the need for ruling on a waiver and other requests would be mooted.

Further, I strongly oppose the policy announced in paragraph 8 "of not considering requests for waiver by persons operating in violation of section 74.1107 until the violation has ceased." Where CATV's have appeared to be operating in contravention of section 74.1107, we have issued, pursuant to section 312(c) of the Communications Act, orders to show cause why a cease-and-desist order should not be issued. Until an operator is found in an evidentiary show cause proceeding to be in violation of the rule and a cease-and-desist order has been issued, I believe that the Commission is in no position to conclude summarily and arbitrarily that he is in violation and penalize him by withholding action on a bona fide request for waiver. The announced policy is tantamount to finding an operator guilty and executing punishment before he has been given a trial.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, *arguendo*, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication except as otherwise provided by the agency upon good cause found and published with the rule.

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the

rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication, and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rule-making without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,

STORER BROADCASTING CO., and

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 26 1966

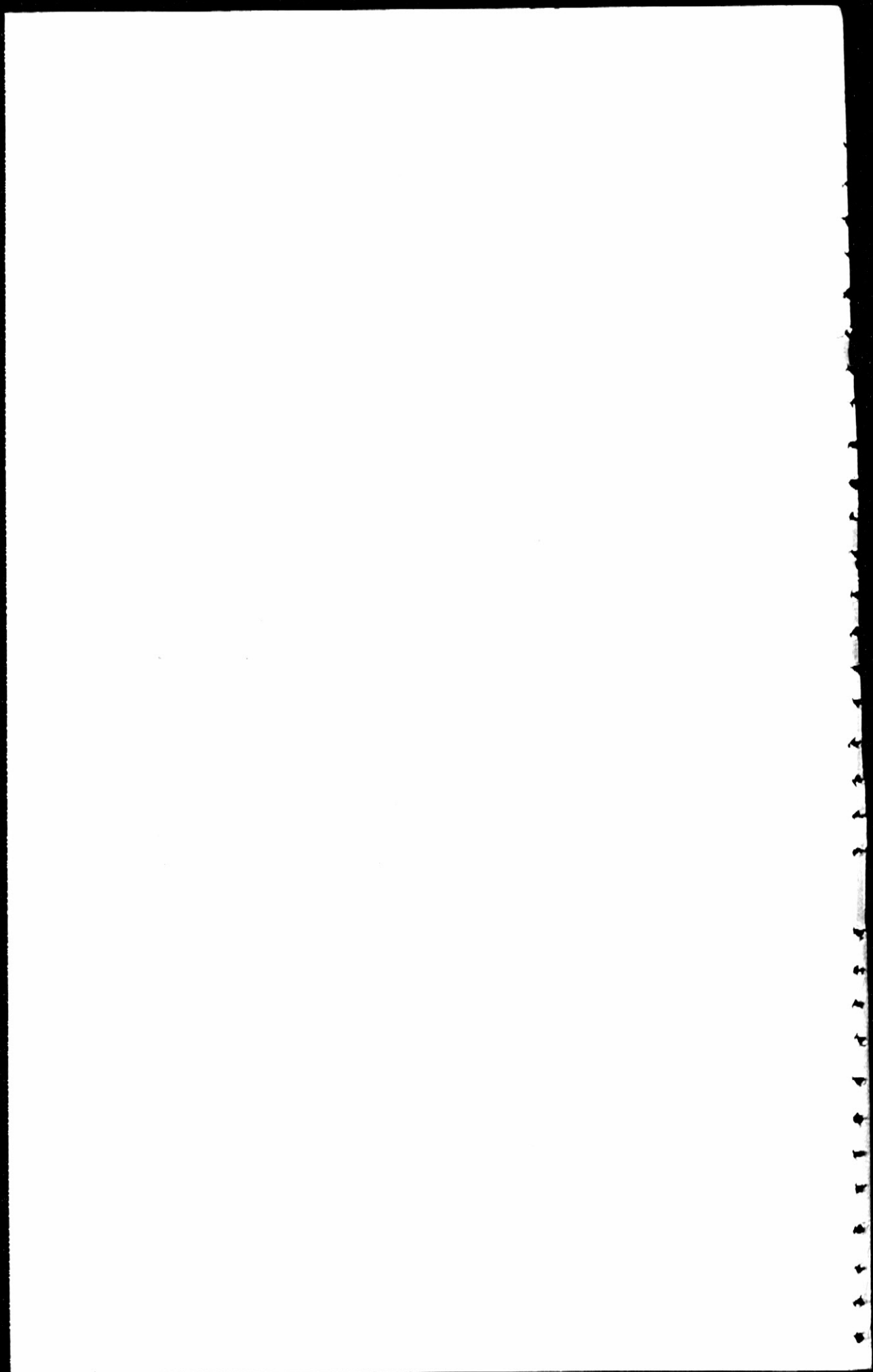
Nathan J. Paulson
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Peter L. Koff *DK*

**1822 Jefferson Place
Washington, D. C. 20036**

Counsel for Appellant

September 26, 1966



(i)

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the adoption of certain new community antenna (CATV) rules by the Federal Communications Commission and their application to appellant constitute an unreasonable prior restraint on appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

2. Whether the Commission failed to give appellant and other interested parties adequate notice and adequate opportunity to comment upon provisions of the new CATV rules, in violation of Sections 4(a) and 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. Whether Section 74.1107 is an unlawful retroactive rule, and the Commission in implementing this rule failed to show "good cause" for waiving Section 4(c) of the Administrative Procedure Act.

4. Whether by drastically restricting the scope of appellant's hearing and by ordering an expedited hearing procedure, the Commission arbitrarily and unreasonably violated appellant's statutory and constitutional right to a full and fair hearing.

PRELIMINARY STATEMENT

Appellant herein filed with this Court on August 4, 1966 a motion to hold this appeal in abeyance because of the action of this Court in transferring to the Eighth Circuit jurisdiction over certain appeals challenging the validity of the Commission's Second Report and Order.* The Federal Communications Commission, appellee herein, argued in response that the action requested by appellant

* *Midwest Television, Inc. v. FCC*, Nos. 19,975 and 20,021; and *Midwest Video Corp. v. FCC*, No. 20,264 (July 13, 1966).

(ii)

should not be taken because this case raises some issues not present in the Eighth Circuit litigation. The Commission correctly pointed out that the appellant has alleged procedural error and arbitrary action in connection with the issuance of the Cease and Desist Order which affect this case, but which have nothing to do with the issues on appeal in the Eighth Circuit. On August 30, 1966 this Court, acting through the Chief Judge, held that on consideration of the motion and the responsive pleadings, the motion to hold in abeyance should be denied.

Therefore, appellant is filing its brief herewith. In doing so, it should be pointed out that appellant challenges the asserted jurisdiction of the Federal Communications Commission to regulate CATV systems that do not utilize microwave facilities to obtain signals for their CATV systems, but present only signals that are available directly off of the air. As this Court is aware, the question of Commission jurisdiction to regulate such CATV systems is now pending in the Eighth Circuit Court of Appeals, which appears to have received sole jurisdiction of this question as a result of this Court's action. In addition, appellant still has pending before the Commission its Petition for Reconsideration of the Second Report and Order, filed on March 25, 1966 in Docket No. 15971. This petition has not been acted upon by the Commission. Therefore, briefing of the questions related to the validity of the Second Report and Order or to the Commission's jurisdiction would not be appropriate at this time.

Unless directed by this Court, appellant will not brief nor argue the jurisdiction question, which is basic in this case. For the purposes of this brief, appellant will assume, without accepting, that the Commission's assertion of jurisdiction is valid. In the event this Court is not able to reach a decision favorable to appellant on the matters briefed herein, appellant respectfully reserves the opportunity to brief these other matters before this Court upon conclusion of the Eighth Circuit litigation.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,

STORER BROADCASTING CO., and

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a cease and desist order issued by the Federal Communications Commission on May 27, 1966 and is brought under Section 402(b)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(7); Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009; and Rule 37 of the Rules of this Court. Notice of appeal was filed by appellant on June 26, 1966.

STATEMENT OF THE CASE

Preliminary Statement

The instant proceeding concerns the validity and legality of a cease and desist order issued by the Federal Communications Commission (Commission) on May 27, 1966 and directed to appellant, Buckeye Cablevision, Inc. (Buckeye).¹ Appellant is the owner and operator of a community antenna television (CATV) system in Toledo, Ohio. It receives the television broadcast signals of several stations at its antenna tower, amplifies these signals and then distributes them to subscribers in the Toledo area by means of coaxial cable. Appellant's entire operation is confined to the State of Ohio and does not utilize microwave relay facilities. The salient advantage it affords its subscribers is an increased choice of programming alternatives and high signal quality without necessity for erection of an individual antenna at each subscriber's home.

The History of Buckeye Cablevision, Inc.

Following public hearings in the early months of 1965, the appellant received a franchise to operate a CATV system in Toledo by unanimous vote of its City Council on May 7, 1965. Permits were also obtained from the neighboring communities of Sylvania, Maumee, and Perrysburg. In July of 1965, Buckeye began its diligent efforts toward becoming operational. It contracted with Ohio Bell Telephone Co. for the construction of a CATV system to cover the greater Toledo area and made substantial payments in connection therewith. It purchased and accepted the delivery of equipment, leased office facilities, and employed and trained personnel. Buckeye's projected operations always envisioned the carriage of all signals it could receive off-the-air. When the Commission's new CATV rules were issued, it had invested

¹*Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798 (1966).

over \$500,000 in its CATV system and had committed itself to expenditures totaling at least \$5,777,000 over the next ten years.

Commission Attempts To Regulate the CATV Industry

Unsure of its jurisdiction under the Communications Act of 1934, as amended, to regulate CATV systems, and seeking guidance from the Congress to clarify its doubts, the Commission followed a circuitous route in the late 1950's and early 1960's as to whether it could and should assume jurisdiction over the growing CATV industry. Finally in 1965, based on the Commission's authority to allocate scarce frequencies and the end use to which they are applied, and because of increased concern with the impact that the CATV industry would have upon the orderly growth and development of its UHF and VHF television frequency allocations, the Commission assumed jurisdiction over all CATV systems employing microwave relay facilities.²

On this same day, it issued a Notice of Inquiry and Notice of Proposed Rule Making that contrary to its previous position tentatively concluded that the Commission had jurisdiction to regulate directly the entire CATV industry, including those systems which received all their signals off-the-air.³ The Commission invited comments on its proposed assumption of jurisdiction over all CATV systems irrespective of the use of microwave facilities, and on such broad substantive questions as what interim action the Commission should take with respect to CATV impact on UHF development, whether restrictions should be imposed on CATV extension of television signals, and

² *First Report and Order on Microwave Relays*, Docket Nos. 14895, 15233, 4 Pike & Fischer RR 2d 1725 (April 23, 1965).

³ *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 15971, 1 F.C.C. 2d 453 (1965) (hereinafter cited *Notice of Inquiry*).

the matter of CATV program origination. However, the Commission stressed that "the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations."⁴ No specific rules were proposed. Instead, the Commission assured interested parties that "a further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission,"⁵ and after study of the comments the Commission contemplated affording interested parties "oral argument on these important matters" and contemplated soliciting "oral testimony."⁶

No further notice of proposed rule making containing specific rule proposals was ever issued. Nor did the Commission provide a full evidentiary hearing or an opportunity for oral testimony or argument on specific rules. Instead, after receiving the comments solicited in its Notice of Inquiry, the Commission on February 15, 1966 released a public notice⁷ to the effect that it was asserting jurisdiction over all CATV systems, and that it had informally agreed upon a broad plan for the regulation of CATV systems. Its plan was to include new CATV rules soon to be written and incorporated in a report and order shortly to be issued, and legislative recommendations for Congressional consideration. The public notice, in broad terms, announced agreement upon rules relating to carriage and non-duplication requirements and upon a policy regarding importation of distant signals that was tied to the date of this notice.

On March 8, 1966 the new rules were finally agreed

⁴ Notice of Inquiry, ¶ 64.

⁵ *Ibid.*

⁶ *Id.* at ¶ 68.

⁷ Public Notice-G, No. 79927 (Feb. 15, 1966). A public notice is a press release, available at the Commission's offices in Washington, D. C.

upon and adopted by the Commission⁸ in the form of a Second Report and Order, which was published in the Federal Register on March 17, 1966.⁹ In general the new rules were adopted effective April 18, 1966, except the Commission purported to make Section 74.1107 relating to the extension of distant signals effective immediately upon publication in the Federal Register, and applied as of February 15, 1966.

The History of the Instant Proceeding

Buckeye commenced supplying signals to its subscribers on March 16, 1966, a date long after it had expected to be in operation, by carrying in full compliance with all laws and regulations all television signals it could receive off-the-air, without the use of any microwave. When the new CATV rules were first published on March 17, 1966, Buckeye was carrying two signals which the new rules seemed to define as "distant" signals, but whose carriage had previously not been contrary to any rule.¹⁰ On March 25, 1966 the Commission issued an Order to Show Cause why Buckeye Cablevision should not be required to cease and desist importing distant signals in violation of Section 74.1107 of the Commission's Rules. In particular the Commission stated that Buckeye was unlawfully supplying its customers the "distant signals" of WKBD-TV,

⁸ Public Notice-G, No. 80850 (March 8, 1966).

⁹ *Second Report and Order*, Dockets No. 14895, 15233 and 15971, 2 F.C.C. 2d 725, published in 31 Fed. Reg. 4540-73 (March 17, 1966) (hereinafter cited *Second Report and Order*).

¹⁰ Section 74.1107 prohibits any CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets, as defined by the American Research Bureau (ARB), from extending the signal of a television broadcast station beyond the Grade B contour of that station if any such "distant signal" was not being supplied as of February 15, 1966, except upon a showing that such extension is in the public interest. "Distant signal" is defined in Section 74.1101(i) of the new rules.

Detroit, Michigan and WJIM-TV, Lansing, Michigan (R. 1-4).¹¹

In this order the Commission allowed Buckeye only the minimum statutory period to prepare its case, directed the hearing examiner to certify the record immediately to the Commission for final decision upon closing the record, and directed that proposed findings of fact and conclusions of law be filed within seven days after closing of the record. It stated the sole issue to be resolved was compliance with Section 74.1107.

On March 25, 1966 appellant filed a petition before the Commission asking it to reconsider its Second Report and Order.¹² Appellant addressed itself in particular to two aspects of the new rules: 1) the artificial concept of Grade B contours; and 2) the effective date for implementing Section 74.1107 violated Section 4(c) of the Administrative Procedure Act, and this section was an unlawful retroactive rule. That day appellant filed a second petition before the Commission, wherein appellant demonstrated the need for a waiver of Section 74.1107 if Buckeye was not operating in compliance therewith.¹³ These petitions assumed, without conceding, that the Commission had constitutional authority to promulgate the Second Report and Order.

In the meantime, Buckeye was concerned that the hearing should have far greater scope than be restricted to the sole issue of alleged non-compliance with Section 74.1107. Accordingly, on April 18, 1966 it filed a Petition to Clarify or Enlarge Issues (R. 17-38), and a Petition for Continuance (R. 64-66). On the same day appellant filed

¹¹ This order stated Toledo was ranked as the 26th television market by ARB, and therefore the prohibitions of Section 74.1107 would be applicable.

¹² Petition for Reconsideration of Buckeye Cablevision, Inc., Docket No. 15971 (March 25, 1966).

¹³ Petition of Buckeye Cablevision, Inc. for Declaratory Ruling, for Waiver or Other Appropriate Relief, Docket No. 15971 (March 25, 1966).

a Petition for Reconsideration and Consolidation, requesting the Commission to reconsider its Order to Show Cause, and in the event it determined to proceed with the case to consolidate with the show cause hearing the issues raised in its Petition for Declaratory Ruling, For Waiver, or Other Appropriate Relief. (R. 39-63). On April 19, 1966 appellant filed a Petition for Stay requesting the Commission to stay, with respect to appellant, the effective date of the Second Report and Order. (R. 68-79).

On April 27, 1966 the Commission, by order, denied appellant's request for reconsideration of that portion of the Order to Show Cause which scheduled the hearing to commence on April 28, 1966 and denied appellant's request for continuance of such hearing. It also denied appellant's petition to consolidate the show cause hearing with an evidentiary hearing on its petition for waiver. (R. 91-92).

During the prehearing conferences held on April 19th and April 25th the hearing examiner refused to consider any evidence not directly relating to the issue of compliance with the new rules. (Tr. 1-25, 26-39). The hearing was held on April 28, 1966. On May 5, 1966 appellant filed a request for oral argument before the Commission. (R. 303-05). On the same day appellant filed its proposed findings and conclusions of law and a brief in support thereof. (R. 208-20, 221-68).

The Commission's decision released May 27th denied the request for oral argument and the petition for enlargement of the issues. It also ordered Buckeye to cease and desist operating its CATV system in such a way as to extend the signals of any television broadcast station beyond its Grade B contours in violation of Section 74.1107 of the Commission's Rules, and in particular to cease and desist supplying its subscribers the signals of WJIM-TV, Lansing, Michigan.¹⁴ On the same day it denied appel-

¹⁴ 3 F.C.C. 2d 798-807. The Commission's evidence had established that the Grade B signal of Station WKBD-TV actually covered part of Toledo and was not, therefore, a distant signal under Section 74.1107.

lant's Petition for Declaratory Ruling, for Waiver, or Other Appropriate Relief, but treated the petition as a request for a hearing under Section 74.1107 of its rules and returned the same to the processing line.¹⁵ In a Memorandum Opinion and Order adopted the same day, the Commission denied Buckeye's petition for stay of the effective date of the Second Report and Order. (R. 357-72).¹⁶ No action has been taken on appellant's Petition for Reconsideration directed to the Second Report and Order.

STATUTES AND COMMISSION RULES INVOLVED

The following statutes and rules involved are printed as a supplement to this brief:

Sections 4(a), 4(b) and 4(c) of the Administrative Procedure Act, 5 U.S.C. §§ 1003(a), (b), (c).

Sections 312(b), (c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(b), (c).

Sections 409(a), (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 409(a), (b).

Section 74.1101(i) and Section 74.1107 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1101(i), 74.1107.

STATEMENT OF POINTS

1. The adoption of certain new community antenna (CATV) rules by the Federal Communications Commission and their application to appellant constitute an unreasonable prior restraint on appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

¹⁵ *Buckeye Cablevision, Inc.*, File No. CATV 100-5, 3 F.C.C. 2d 808 (1966). This is still pending at the Commission.

¹⁶ Memorandum Opinion and Order, Dockets No. 14895, 15233, 15971, 3 F.C.C. 2d 816 (1966).

2. The Commission failed to give appellant and other interested parties adequate notice of and adequate opportunity to comment upon provisions of the new CATV rules, in violation of Sections 4(a) and 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. Section 74.1107 is an unlawful retroactive rule, and the Commission in implementing this rule failed to show "good cause" for waiving Section 4(c) of the Administrative Procedure Act.

4. By drastically restricting the scope of appellant's hearing and by ordering an expedited hearing procedure, the Commission arbitrarily and unreasonably violated appellant's statutory and constitutional right to a full and fair hearing.

SUMMARY OF ARGUMENT

This appeal raises major questions of constitutional, statutory and administrative law. It focuses upon the Commission's compliance with requirements governing the process of orderly rulemaking, and it focuses upon appellant's due process rights to a full and fair hearing when the Commission seeks to enforce untested rules upon appellant.

Appellant first questions the constitutional validity of the Commission's new CATV rules, which in their application to Buckeye Cablevision, Inc. become an unreasonable prior restraint on appellant's rights to free speech protected under the First Amendment. The Commission has failed to justify that the new rules are in the public interest. Rather, it assumes that regulation of all CATV systems is necessary because of the possible effect they may have in discouraging growth of new UHF markets. But the Commission fails to consider the important ways that CATV systems in fact encourage UHF development. Furthermore, the rules are written so broadly that they go beyond their alleged legitimate purpose and instead jeopardize the free flow of information so precious to our society.

Next, appellant points out the serious violations of due process and the substantial departures from sound practices of orderly rule making that mark the Commission's adoption of the new CATV rules. In advance of adoption of these rules in the Second Report and Order, the Commission failed to issue specific rule proposals with full opportunity for public comment, as it had promised, in violation of Section 4(a) of the Administrative Procedure Act. The public was completely unaware of integral aspects of the new rules, and had no idea they were under Commission consideration, until a routine press release was issued just weeks before the Commission's publication of its Second Report and Order. In particular, interested parties had completely no knowledge with respect to the "grandfathering" provision in Section 74.1107 that is the very heart of the Commission's major market distant signal policy.

Furthermore, in light of the substantial public interest questions involved in the adoption of new rules to regulate an entire new industry, with the probability of serious disruption to property interests of existing CATV operations, the Commission's failure to provide interested parties a full hearing and opportunity for oral argument violated Section 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

An even more serious violation of due process marks the Commission's adoption of Section 74.1107 of the new rules in violation of Section 4(c) of the Administrative Procedure Act and contrary to all prohibitions against retroactive rule making. Section 74.1107, which prohibits the importation of "distant signals" by CATV systems not supplying these signals as of February 15, 1966, was in practical operation made effective more than a month prior to the date the new rules were first published in the Federal Register on March 17, 1966. Without specific statutory authority and contrary to Congressional policy embodied in the Administrative Procedure Act, and without considering the great disruption this rule would have upon

CATV systems that for many previous months had been making plans and commitments completely ignorant of any Commission intention to "grandfather CATV systems as of February 15th, the Commission's implementation of this rule retroactively is unlawful and the rule is invalid.

In any event, the Commission's Second Report and Order failed to show "good cause" for waiving the requirement of Section 4(c) of the Administrative Procedure Act that new substantive rules may be effective no sooner than thirty days after publication in the Federal Register. The Commission erroneously assumes the correctness of the February 15th "grandfather" date, fails to justify a waiver of Section 4(c) with specific facts, and ignores the massive disruption to existing CATV systems that the new rules would create. Thus "good cause" for making Section 74.1107 effective sooner than April 18, 1966 has not been shown.

Attempting to enforce the new rules against appellant, the Commission committed serious breaches of Buckeye's statutory and constitutional rights of due process. First, the Commission failed to provide Buckeye a full hearing on all facets of the public interest in the enforcement of untested and controversial rules upon appellant. Instead, it chose to consider only one issue, compliance with Section 74.1107. Buckeye's repeated attempts to enlarge the hearing were casually disregarded by the Commission. In so doing, and in refusing to consider any issue except appellant's alleged non-compliance with its rules, the cease and desist order issued against appellant is invalid. This Court has so held in a recent interlocutory order in a case pending before this Court based on substantially identical facts, *Booth American Co. v. FCC*, wherein this Court reaffirmed its holding in *C. J. Community Services, Inc. v. FCC* that a cease and desist order cannot be predicated on the naked finding that one of the Commission's rules has been violated if possible extenuating circumstances have not been considered.

In addition, the Commission ordered an expedited hearing schedule that denied Buckeye its statutory right to file exceptions to the hearing examiner's initial decision. Section 409 of the Communications Act permits this abbreviated schedule *only* when, upon the record of the instant proceeding, the Commission finds imperative circumstances for having the record immediately certified to the Commission for final decision. Contrary to this explicit provision, the Commission's finding of necessity for immediately certifying Buckeye's record to the Commission for final decision, without opportunity to file exceptions to an examiner's report, was not based upon the record of the instant proceeding. To the contrary, its alleged finding of necessity contained in the Order to Show Cause directed to Buckeye was made even before the record in the instant proceeding was begun.

As if these violations of due process were not enough, the Commission rushed appellant through an extremely unfair time schedule denying it full opportunity to prepare its case and denying it the opportunity to present oral argument before the full Commission. The unfairness of the "hearing" the Commission afforded Buckeye is too obvious to belabor and commends the full attention of this Court.

ARGUMENT

I.

The Commission's New CATV Rules, Particularly Section 74.1107, Are an Unconstitutional Infringement of Appellant's Rights Under the First Amendment.

Buckeye Cablevision, Inc. is engaged in the dissemination of meaningful information, by bringing into individual homes a wide assortment of high quality television signals. It is clear that its operations come within the scope of the First Amendment, as do other forms of business activities engaged in producing and distributing entertainment and information. Besides newspapers and magazines,

pamphlets, leaflets, and every sort of publication, *Lowell v. City of Griffin*, 303 U.S. 444 (1938), motion pictures and stage presentations, *Kingsley Int'l Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684 (1959), and radio and television, *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), are protected by the First Amendment.¹⁷ The Supreme Court has held that the First Amendment protects almost every aspect of communications, including "not only the right to utter and print, but the right to distribute, the right to receive, and the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

The Commission's new CATV rules abridge appellant's right to distribute information and entertainment free from governmental interference.¹⁸ They force appellant to carry certain signals (Section 74.1103(a)), require the non-duplication of other signals (Section 74.1103(e), (f)), and in effect preclude Buckeye from distributing all television signals available off-the-air (Section 74.1107). The discriminatory effect of Section 74.1107 is particularly onerous. While individual Toledo citizens are free to erect antennas capable of bringing them all television signals available off-the-air, Section 74.1107 precludes Buckeye from receiving and distributing to individual homes these same signals if they are received beyond the station's predicted Grade B contour.

Appellant concedes that the rights protected under the First Amendment are not absolute, but are subject to reasonable restrictions deemed sufficiently necessary in

¹⁷ It is clear that the First Amendment was intended to have a broad scope in order to insure the free communication and interchange of ideas. *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

¹⁸ In addition to violating the First Amendment, these rules contravene the censorship provisions of Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326.

the public interest. The crucial inquiry, therefore, is twofold: namely, whether there exists a substantial public interest that justifies a restriction upon the free reception of television signals; and, if so, whether in practical application the impact of these rules is no broader than necessary to achieve their legitimate objective.

A. The Commission has failed to justify that new CATV rules are necessary in the public interest.

The presence of a CATV system in a community does much to further the widest possible dissemination of information, which the Supreme Court has stated is "essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1 (1945). By receiving signals that it can pick up off-the-air and distributing them to its subscribers, Buckeye not only broadens the effective range of programming alternatives, but it maximizes the quantum of diverse and antagonistic opinion reaching the viewers.

In adopting the new CATV rules, the Commission justifies the restrictions they impose by stating that the uncontrolled growth of CATV will interfere with its carefully worked-out scheme of UHF and VHF frequency allocations.¹⁹ Specifically, the Commission fears that future CATV successes will fragmentize the viewing market to such an extent that market entry by new UHF stations will be inhibited. Certainly the development of unused UHF allocations is in the public interest. Appellant submits, however, that there is no factual basis for the fears the Commission has expressed regarding UHF development.

Rather than dampen UHF development, the presence of a CATV operator in a community does much to encourage the development of new UHF stations. A CATV system expands their viewing and advertising markets by making their signals available to subscribers whose television sets do not possess UHF capability, or who themselves

¹⁹Second Report and Order, §§ 113-30.

are unaware of its existence. Furthermore, many factors in addition to the presence or absence of a CATV system influence decisions to enter new UHF markets. Thus, when viewed in perspective, the Commission's proffered justification for its rules fails to overcome the "heavy presumption against its constitutional validity." *Freedman v. Maryland*, 380 U.S. 51 (1964).

B. The Commission's rules go far beyond their legitimate objective.

Even assuming that the Commission has demonstrated a sufficiently pressing problem affecting the public interest, the new rules have been written with such broad effect that they go completely beyond their alleged justification, *i.e.*, the orderly development of the Commission's frequency allocations.

The Supreme Court had made it clear that it is inconsistent with the spirit of the First Amendment to "contract the spectrum of available knowledge." *Griswold v. Connecticut*, *supra* at 482. Therefore, it is well-established that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberty when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

One effect of Section 74.1107 is the elimination of sources of knowledge and entertainment without the current prospect of any substitute therefor. The Commission alludes to the future development of UHF stations, but this does not remedy the immediate deprivation. Another effect of the rules is the elimination of CATV or a competitive factor in the broadcast industry. The benefits accruing to the general public as a consequence of healthy competition need no reiteration here. In this instance, CATV systems unhampered by the present restrictions would provide sufficient incentive for broadcasters to improve their programming quality. But at present these benefits are lost.

It is little comfort for the Commission to argue that Section 74.1107 is not an absolute restriction on the importation of distant signals, since the evidentiary hearing permitted under that section imposes such a heavy burden on petitioners²⁰ that the rule, in practical effect, approaches the total censorship recently struck down by the California Supreme Court in *Weaver v. Jordan*, 411 P.2d 289 (1966). In that case, the court held that a California statute purporting to ban all pay-TV in the state was unconstitutional in light of its effects upon appellant's right to distribute. The court was convinced that the statute in question would encourage monopolistic domination of television by existing stations, prohibiting the widest possible range and choice of ideas and of expression. The same serious effect on the public's right to free expression is an inevitable result of the Commission's unreasonable attempt to regulate CATV systems.

II.

Adoption of the CATV Rules Without Adequate Notice and Without Affording Interested Parties Adequate Opportunity to Participate in the Rule Making Violates Sections 4(a) and (b) of the Administrative Procedure Act and Due Process Guarantees of the Fifth Amendment.

The Commission's adoption of the new CATV rules contained in its Second Report and Order completed a rule making proceeding markedly short in concern for the constitutional due process and statutory guarantees that govern such actions. The new rules were issued without affording interested parties sufficient notice as to the nature of its proceeding and without allowing the public adequate opportunity to participate in the rule making proceeding.

Congress incorporated the due process guarantees of

²⁰ *Booth American Co.*, 5 F.C.C.2d 509, 519-20 (1966) (dissenting Opinion of Commissioners Bartley and Loevinger).

the Fifth Amendment into Section 4 of the Administrative Procedure Act,²¹ providing a set of procedural safeguards with which administrative rule making actions must comply, in order that adoption of new substantive rules would cause as little inconvenience to the public as possible and not accomplish a substantial taking of property in violation of the Fifth Amendment.

Section 4(a) of the Administrative Procedure Act provides that notice of the proposed rule making shall be published in the Federal Register and must include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." It is clear from the legislative history of this section that the notice issued by an agency in compliance with the mandate of Section 4(a) "must be sufficient to fairly apprise interested parties of the issues involved so that they may present responsive data or arguments relating thereto," and that "where notice is required it should be complete and specific...." ²²

Section 4(b) provides that after notice has been issued, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ." It is the intent of Sections 4(a) and (b) together to insure that the rule making process will maximize opportunities for interested parties to be on notice of and be able to effectively participate in rule making proceedings.

²¹ 5 U.S.C. § 1003.

²² S. Doc. No. 248, 79th Cong., 2d Sess. 200, 358 (1946).

A. Interested parties were not afforded adequate notice as required by Section 4(a).

The Notice of Inquiry given by the Commission in advance of adopting Section 74.1107 and the other new CATV rules falls so woefully short of meeting the minimum notice requirements guaranteed by Section 4(a) of the Administrative Procedure Act that the Commission's action in this case is completely lacking any valid statutory or administrative basis. Rule making actions are normally begun by the Commission's issuance of the text of its proposed rules, along with an invitation for interested persons to comment on these proposals. The Notice of Inquiry issued in advance of adoption of the new CATV rules, however, nowhere set out specific rules whose adoption was under consideration by the Commission. At best the vague and conflicting statement contained in the Notice of Inquiry led interested parties to believe that the Commission was considering the adoption of an interim policy in the non-microwave CATV area, to be followed by the issuance of a further notice of inquiry or rule making containing specific rule proposals.

(1) The public was led to believe that a further notice and opportunity to comment would precede the adoption of final rules.

The Notice of Inquiry questioned by appellant was divided into two main parts. Part I related to possible assumption of jurisdiction by the Commission over non-microwave served CATV systems, and the Commission's proposal to adopt the same rules with respect to these systems that had been previously adopted with respect to microwave served CATV systems in its First Report and Order. While the Commission stated that its case for jurisdiction was "a strong one," it was quick to point out that it "would carefully consider comments addressed to this aspect" and reiterated its view that clarifying legislation is necessary in light of the "new and important questions of policy and law in the communications field."

The Commission flatly stated that it had "no intention of by-passing Congressional action in this field."²³ The Commission's subsequent actions completely contradicted this premise.

Part II of the Notice of Inquiry was directed to broader questions involving both microwave and non-microwave served CATV systems for which the Commission desired to collect further information. These questions included the effect on independent UHF development and the effects of future CATV growth and penetration in the larger markets.

Numerous statements throughout the Notice of Inquiry show the Commission's complete dismissal of any intention to adopt final rules until after issuance of a further notice. For example, four open concessions to this effect are contained in Paragraphs 64 and 68:

- (1) "[T]he main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations." (¶64).
- (2) "In the absence of further information we do not have a sound basis for specific rule proposals." (¶64).
- (3) "A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission." (¶64).
- (4) "After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited...." (¶68).

Pending the completion of this additional inquiry and resolution of the question of jurisdiction, the Commission led the public to believe that it was considering the adop-

²³Notice of Inquiry, §§ 30-31.

tion of an interim procedure. This is clear from Paragraph 50 of the Notice of Inquiry, for example, where the Commission invited comments on what form of interim action might be appropriate with regard to the possible effect that new CATV systems would have on the development of UHF broadcasting.

Contrary to the above statements in its Notice of Inquiry, the Commission adopted final rules regulating non-microwave served CATV systems without issuing a further notice, specific rule proposals, or adopting an interim procedure. Clearly the public was misled by the bald promises of the Commission. Just as clearly, this lack of good faith is not tolerated under Section 4(a) of the Administrative Procedure Act and the Fifth Amendment.

(2) The Notice of Inquiry was not specific as to the terms and substance of the proposed new rules.

Section 4(a) of the Administrative Procedure Act insures that an agency's notice of proposed rule making will disclose the tenor and substance of proposed rules with a much greater degree of specification than did the Notice of Inquiry issued by the Commission back in April of 1965. The drafters of Section 4(a) intended to obligate each agency "to announce with the greatest possible definiteness" the matters under consideration.²⁴ In conflict with this goal, however, the Notice of Inquiry issued by the Commission was too vague, too contradictory and too incomplete to serve as adequate notice.

Perhaps the strongest evidence of notice deficiency is the wide disparity between the broad general matters of concern set forth in the Notice of Inquiry and the rules actually adopted in the Second Report and Order. For example, at no place does the Notice of Inquiry mention anything about establishing "grandfather" rights with

²⁴S. Doc. No. 248, 79th Cong. 2d Sess. 18 (1946).

respect to the importation of distant signals. When the new rules were issued, however, Section 74.1107 conferred "grandfather" rights on those CATV systems which on February 15, 1966 were supplying to their subscribers a television signal extended beyond its Grade B contour.

Specification as to the major substantive provisions of the new rules similarly was lacking. In regard to Section 74.1107 of the new rules, for example, the Notice of Inquiry made no mention of a standard based on the top 100 ARB markets,²⁵ nor did it state that the signal from a UHF station available off-the-air in a community beyond its predicted Grade B contour would be a prohibited "distant" signal.

In failing to give the public adequate notice with sufficient clarity as to the scope and nature of the Commission's intended proceeding, the public was deprived of a meaningful opportunity to participate effectively in the rule making proceeding. It is axiomatic, of course, that complete and specific notice is particularly essential in a case of this nature where there is an intent to assert authority over new areas. The Notice of Inquiry was so equivocal that it failed to convey clearly to the public what the Commission intended to do. It cannot serve as legal notice under Section 4(a), and it most certainly does not satisfy the due process requirement of the Fifth Amendment, particularly when affected parties such as appellant never were conscious of the immediacy of the threat to their property.

²⁵ In fact, dependence on a private commercial entity to measure market rankings is an unlawful and arbitrary delegation of agency power to a private concern, particularly when this concern has been so extensively criticized by the Commission in the past.

B. The Commission denied interested parties the right to participate effectively in the rule making proceedings.

An equally serious defect inherent in the rule making proceeding which culminated in the adoption of the Second Report and Order is the Commission's failure to afford appellant and others the full hearing contemplated by Section 4(b) of the Administrative Procedure Act and the Fifth Amendment. Of course, Section 4(b) does not compel a full evidentiary or oral hearing in every case of administrative rule making. But since the purpose of this section is to allow interested parties to participate effectively in rule making actions, the Commission has traditionally and consistently treated it as a mandatory requirement when considering matters of extreme importance.

Merely by way of example, the Commission determined that evidentiary proceedings and/or oral argument en banc were appropriate and necessary in the interest of sound decision-making in the following instances: (1) color television,²⁶ (2) television allocations,²⁷ (3) network practices,²⁸ (4) subscription television,²⁹ and (5) program service forms of broadcast stations.³⁰ Each of these matters involved important and basic issues seriously affecting the development of the communications industry. Each, like the CATV questions, involved serious factual disputes and conflicting policy recommendations. All parties, pro and con, agree that CATV is a new and dynamic element in the communications field.

²⁶ *First Color Television Report*, 1 Pike & Fischer RR 91:261 (1950).

²⁷ *Sixth Report on Television Allocations*, 1 Pike & Fischer RR 91:601 (1952).

²⁸ *Commission Policy on Programming*, 20 Pike & Fischer RR 1901 (1960).

²⁹ *Hartford Phonevision Co.*, 20 Pike & Fischer RR 737 (1960).

³⁰ *AM-FM Program Forms*, 5 Pike & Fischer RR 2d 1773 (1965).

In adopting the Second Report and Order, however, a hearing of comparable depth was not afforded interested parties. The Commission failed to publish specific rules in advance, denied interested parties the opportunity to introduce evidence orally and cross-examine witnesses,³¹ bypassed reference of the whole matter to a qualified hearing examiner for initial decision, and precluded oral argument before the full Commission on the examiner's recommendations. These procedural shortcomings were compounded when the Commission in issuing the new CATV rules, relied on contradictory data and speculative conclusions from the written comments as a basis for its Second Report and Order. Nowhere did the Commission permit a full hearing that would have exposed the many weaknesses contained in these written comments, nor oral argument and cross-examination to test the various theories, nor the opportunity to comment on specific rule proposals.

The absence of oral argument prior to adoption of the new CATV rules, in light of the highly conflicting comments³² and the substantial public policy issues raised by that proceeding, deprived Buckeye and other interested parties of the full hearing envisioned by Section 4(b) of the Administrative Procedure Act and protected by the Fifth Amendment. Appellant recognizes that "the right of oral argument as a matter of procedural due process under the Fifth Amendment varies from case to case in accordance with differing circumstances" *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275 (1949). But when the Commission seeks to adopt new rules depriv-

³¹ *Morgan v. United States*, 304 U.S. 1 (1938).

³² The myriad of written comments submitted to the Commission were diametrically opposed in both factual content and argument, and the Commission's reasoning in the Second Report and Order depended in large degree on assumptions and speculations as a substitute for facts. See Separate Statement of Commissioner Loevinger, Second Report and Order.

ing CATV systems of substantial property or property rights, and important and bitterly contested issues of public policy have been raised, then fair play requires that interested parties be given the right to present their views orally. *Standard Airlines v. CAB*, 85 U.S. App. D.C. 29, 177 F.2d 18 (1949). See also *L. B. Wilson v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948) (reversing Commission grant of application for construction permit).

It is clear that this Court stands ready to insure that the right to oral argument is protected "in advance of the adoption of controversial regulations governing competitive practices," even if not specifically required by statute, when "deemed inherent in the very concept of fair hearing." *American Airlines, Inc. v. CAB*, ___ U.S. App. D.C. ___, 359 F.2d 624, 632 (1966). As this Court pointed out in the *American Airlines* case, administrative flexibility demands reliance on the good faith of agencies not to dispense with hearings prior to the adoption of controversial rules. *Ibid.* Thus when agency good faith fails, due process protects the rights of the public.

Decisions of this Court consistently have recognized the need for oral testimony and "live" witnesses in Commission proceedings of far-reaching policy importance where property is being taken or destroyed. See, e.g., *Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965) (abuse of discretion not to hold hearing on issue of common ownership of local television station and CATV system); *Clarksburg Publishing Company v. FCC*, 96 U.S. App. D.C. 211, 225 F.2d 511, 516-17 (1955) (full hearing required on issue of concentration of control). The need for a full evidentiary hearing is particularly important when, as here, many public policy issues are in question. *Louisiana Television Broadcasting Corp. v. FCC*, 121 U.S. App. D.C. 24, 347 F.2d 308 (1965) (reversing a Commission grant modifying a construction permit). While the above-cited cases dealt with specific license or consent actions, it would

appear clear that the basic reasoning of the Court applies equally to the broad policy questions involved in the Commission's adoption of the Second Report and Order.

Therefore, the new rules are invalid in that they were adopted without adequate advance notice and without affording interested parties sufficient opportunity to participate in their formulation.

III.

Section 74.1107 Is an Unlawful Retroactive Rule and Was Adopted in Violation of the Thirty Day Publication Requirement of Section 4(c) of the Administrative Procedure Act.

An even more serious violation of due process, orderly rule making procedures, and Section 4(c) of the Administrative Procedure Act marks the Commission's attempted retroactive application of Section 74.1107 of the new CATV rules.

The mandate of Section 4(c) is clear. It specifies that new substantive regulations cannot be made effective until thirty days after publication of the full text of the rules in the Federal Register, except where "good cause" for an earlier implementation is shown. Normally, therefore, Section 74.1107 would be effective on April 18, 1966. With a strong showing of "good cause," the Commission could have chosen not to wait the full thirty days, and instead could have made this rule effective any time sooner than April 18, 1966, up to the date of publication on March 17, 1966.

In adopting the Second Report and Order, the Commission allegedly made Section 74.1107 effective "immediately upon publication in the Federal Register."³³ But in practical operation, the Commission has made Section 74.1107 effective not upon publication (March 17th), but upon the date on which "grandfather" rights are pegged

³³Second Report and Order, ¶ 156.

(February 15th).³⁴ The Commission readily admits that "the effectiveness of our action, practically speaking" is geared to February 15th.³⁵ Thus the Commission has implemented Section 74.1107 before the rule was written, more than a month before the rule was first published in the Federal Register (March 17th), and a full sixty-two days prior to when the rule normally would have taken effect under Section 4(c) (April 18th). This is plainly an attempt to impose a retroactive regulation, clearly violative of basic administrative law, and clearly contrary to Section 4(c) which even upon a showing of "good cause" makes the earliest possible date for implementing a new rule the date of publication.

A. The attempted retroactive application of Section 74.1107 is unlawful.

Any rule which applies to events occurring prior to the date on which the rule is adopted is strongly disfavored and permitted only in the most extraordinary cases. Generally, "retroactive rules should be tolerated only when specifically authorized by statute." 1 *Davis, Administrative Law* 341 (1958). See, e.g., *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry.*, 284 U.S. 370, 389-90 (1932); *Litton Industries v. Renegotiations Bd.*, 298 F.2d 156 (4th Cir. 1962); *Blau v. Hodgkinson*, 100 F.Supp. 361, 371-74 (S.D. N.Y. 1951). Certainly nothing in the Communications Act gives statutory authority for the Commission to adopt retroactive rules regulating CATV systems.

³⁴ Except as to systems already supplying a community in the top 100 ARB markets, on February 15th, with a signal extended beyond its predicted Grade B contour, Section 74.1107 prohibits the importation of "distant signals", except after an evidentiary hearing and determination of the public interest. To date, there has been no "evidentiary hearing" ordered by the Commission in any instance.

³⁵ Second Report and Order, ¶ 147.

The odium of a retroactive rule derives from the great inequity caused to innocent parties who altered their positions in reliance upon the absence of a rule. As the large number of petitions for waiver of Section 74.1107 which have been filed to date so graphically demonstrate, the hardship imposed on the parties involved is completely disproportionate to the end which the Commission is seeking to accomplish. Courts are quick to strike down the application of a retroactive rule when the hardship it creates is altogether out of proportion to the public ends to be accomplished. See, *e.g.*, *NLRB v. E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), *cert. denied* 366 U.S. 908 (1961); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

Congress specifically expressed its disapproval of retroactive rules when it passed the Administrative Procedure Act. Section 3(a)(3) of the Act, 5 U.S.C. § 1002(a)(3), requires publication in the Federal Register of all substantive rules before they may have the force and effect of law. Rule making actions must comply with Sections 4(a) and (b), plus thirty day publication in the Federal Register under Section 4(c). The Commission erred when it departed from all of these requirements in the procedures it followed in the present case.

The attempt to implement these new rules in this fashion violates the basic purposes of both the Administrative Procedure Act and the Federal Register Act.³⁶ Courts have repeatedly stated that these are more than mere record acts. Particularly must the publication requirements be strictly complied with when violations of the regulations in question may involve, as they do here, potential criminal penalties.

The Commission at no place has documented in sufficient detail what exceptional circumstances it feels

³⁶ 44 U.S.C. § 307.

justify the retroactive application of Section 74.1107. Throughout the proceeding below, from which Buckeye has taken the instant appeal, appellant repeatedly challenged the "grandfather" provision of Section 74.1107.³⁷ The Commission's hasty response to these attacks, in ordering Buckeye to cease and desist,³⁸ was merely that it has previously covered this subject in the Second Report and Order, and in the Memorandum Opinion and Order, issued the same day as the order to Buckeye to cease and desist, which denied seven petitions for stay of the effective dates of the Second Report and Order.³⁹

The Commission's justification for the "grandfather" provision, however, consists of only vague, conclusionary statements completely unsupported by specific factual allegations, which may be summarized as follows:

(1) Significant public interest questions are raised by the presence of CATV operations in major television markets;

(2) It is essential that these operations be examined before they become well established, since subsequently the Commission would have difficulty in taking effective action if it should determine a CATV system is operating inconsistent with the public interest.

(3) It is necessary to establish a cut-off date that will preclude the commencement of new operations and extraordinary efforts to beat any proposed deadline.

³⁷ Petition to Clarify or Enlarge Issues (R. 23-24); Petition for Reconsideration and Consolidation (R. 40); Brief of Buckeye Cablevision, Inc. (R. 238-47). In addition, Buckeye challenged this provision in a Petition for Reconsideration of the Second Report and Order, Docket No. 15971, filed March 25, 1966.

³⁸ 3 F.C.C. 2d 801.

³⁹ (R. 357-72) (hereinafter cited Memorandum Opinion and Order).

(4) Therefore, it is reasonable to "grandfather" CATV systems in operation back on February 15th, the date a press release was first issued announcing in general terms the Commission's agreement on major market policies.⁴⁰

Clearly, a convincing showing of necessity supported by detailed factual allegations is completely absent in the Commission's justification for retroactively applying Section 74.1107. For example, the Commission did not have before it any facts concerning how many CATV systems would be affected, how much disruption of service would be caused by making Section 74.1107 effective retroactively, or what financial expenditures had been made and contractual obligations incurred by CATV systems prior to their first knowledge (on February 15th) that "grandfather" rights would be afforded as of that date. Nor did the Commission balance in any way the inconvenience and cost that would devolve upon CATV systems by retroactively applying Section 74.1107, as compared to the possible public harm if this new rule was not so applied. In fact, the Commission admitted the absence of sufficient facts when it adopted the Second Report and Order, but it felt that by freezing the situation as it was as of February 15th would enable it or the Congress thereafter to define the public interest "upon the basis of adequate knowledge."⁴¹

Nor can the Commission argue that interested parties have known about the "grandfather" provision long before the rules were first published on March 17, 1966. As appellant has previously pointed out, the Commission's April 1965 Notice of Inquiry completely failed to give any specification with respect to the major substantive rules

⁴⁰ Second Report and Order, ¶¶ 147-48; Memorandum Opinion and Order, ¶¶ 12-20 (R. 362-65).

⁴¹ Second Report and Order, ¶ 148.

the Commission had under consideration. The first inkling regarding the specific content of those rules did not come until the Commission's February 15, 1966 press release. Only then was the public, for the first time, apprised that "grandfather" rights would be incorporated into the new rules, and only on March 17th, when the new rules were first published were interested parties actually put on notice as to the content of Section 74.1107.

B. No convincing showing of "good cause" has been made to waive Section 4(c), and thus Section 74.1107 may not be made effective sooner than thirty days after publication. Even if "good cause" is shown the rule cannot be effective until published.

The Commission has failed to show "good cause" for waiving the requirement of Section 4(c) of the Administrative Procedure Act that new rules will not be effective until thirty days after publication in the Federal Register. Even if this Court should find that the Commission has adequately shown "good cause" for waiving Section 4(c), Section 74.1107 cannot be made effective any sooner than the day on which it was first published in the Federal Register (March 17th), and not on February 15th as the Commission has attempted.

It is clear that the good cause exception in Section 4(c) should be used only in "extremely urgent situations." *St. Joseph Stock Yards Co.*, 6 A.D. 319 (Dept. Agric. 1947) (milk marketing order). See, e.g., *Dighton v. Coffman*, 178 F. Supp. 114 (E.D. Ill. 1959) (acreage quota change immediately prior to plant season). Or where notice is unnecessary, there is little reason not to waive the thirty day requirement of Section 4(c). See, e.g., *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D. N.Y. 1953), *aff'd*, *Mitchell v. Edward S. Wagner Co.*, 217 F.2d 303 (1954), *cert. denied*, 348 U.S. 964 (1955) (long-standing industry compliance with rule and knowledge on part of plaintiff). The Commission itself has used the exception

sparingly, and only to serve immediate needs of the national security and defense. *Reallocation of Frequencies*, 17 RR 1587 (1959).

Nowhere has the Commission made a convincing showing of "good cause" to support the attempted waiver of Section 4(c). The Commission's attempted demonstration of "good cause" erroneously assumes both the wisdom and necessity of establishing "grandfather" rights as of February 15, 1966. The Commission asserts that it would be foolish for it passively to wait for the thirty day period to expire, and then take action with great inconvenience and disruption against systems which commenced operations after the "grandfather" date. Its argument is simply "good cause" to waive Section 4(c) necessarily exists because we have decided upon February 15th for "grandfather" rights.⁴² Since Buckeye previously has demonstrated that the alleged showing of necessity is insufficient to justify the "grandfather" provision (Brief pp. 27-30), it is similarly insufficient to serve as "good cause" for waiving Section 4(c).

Furthermore, the Commission's attempted demonstration of "good cause" is completely lacking in detailed facts upon which the Commission could rely in waiving the requirements of Section 4(c). Instead, the Commission seems to have relied upon purely unfounded speculation as to the grave consequences that would ensue if Section 74.1107 was not made effective upon publication and applied retroactively to February 15th, as is clearly pointed out in the dissent of Commissioner Bartley to the issuance of a cease and desist order against Buckeye below.⁴³

⁴² Second Report and Order, ¶ 147; Memorandum Opinion and Order, ¶ 21 (R. 366).

⁴³ 3 F.C.C.2d 806-07. See also Commissioner Bartley's dissent, in which Commissioner Loevinger joins, in a similar cease and desist order issued against the Booth American Co., 5 F.C.C. 2d at 519-20 (July 13, 1966).

On the other hand, it appears that no consideration was given to the massive disruption to developing enterprises such as Buckeye, involving substantial investments and commitments of capital. All of these commitments and expenditures were made over extended periods of time during which the Commission has followed an uncertain and circuitous route, even as to its view of jurisdiction over off-the-air systems, for which legislative authority is still being sought while appeals on this point are pending.

IV.

Buckeye's Constitutional and Statutory Rights to a Full and Fair Hearing Were Violated, and Therefore the Commission's Cease and Desist Order Is Invalid.

A. The cease and desist order is invalid since the Commission refused to consider public interest considerations weighing against issuance of such an order.

The so-called "hearing" that Buckeye was afforded demonstrates the striking arbitrariness with which the Commission has proceeded against appellant. The Order to Show Cause issued pursuant to Section 312(c) of the Communications Act⁴⁴ directed "that there is only one issue to resolve, *i.e.*, compliance with the rules [Section 74.1107]." (R. 3). Time and time again Buckeye attempted, each time unsuccessfully, to enlarge the scope of the hearing to permit a full exploration of the public interest in the application of untested rules to appellant.⁴⁵

⁴⁴ Section 312(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(c).

⁴⁵ On April 18, 1966 Buckeye filed with the Commission a Petition to Clarify or Enlarge Issues, specifically setting forth what additional issues should have been included. (R. 17-38). This petition has never been acted upon. On the same date it filed a Petition for Reconsideration and Consolidation, in part requesting the Commission reconsider the limited scope it intended to

Since the legality of the new CATV is pending final determination in Congress and the courts, the various pleadings filed by Buckeye questioned the wisdom of enforcing these rules by the immediate issuance of a cease and desist order, unless the Commission undertook a broader inquiry into all facets of the public interest. In particular, Buckeye cited the irreparable injury it would suffer if prohibited from carrying any "distant signals"; the substantial efforts it had made and financial obligations it had undertaken in order to bring CATV to Toledo, prior to any Commission decision prohibiting importation of "distant signals" not being supplied on February 15, 1966; the public interest of the citizens of Toledo in a wide variety of television programs; and the questionable procedural steps taken by the Commission in adopting the Second Report and Order. None of these important issues was ever considered by the Commission.

In refusing to consider the facts and circumstances spelled out above which possibly extenuate Buckeye's actions, the Commission may not, as it did here, predicate a cease and desist order on the naked finding that one of its rules has been violated. This is the clear holding of this Court in its recently released memorandum opinion in granting a stay of the Commission's cease and desist order in a proceeding similar to the instant case. *Booth American Co. v. FCC*, No. 20,367, p. 5 (Sept. 16, 1966). While this Court recognized the legitimate interest of the Commission in stopping CATV extensions pending consid-

give the hearing and in part requesting that if the Commission should fail to reconsider its Order to Show Cause, then the issues raised by Buckeye's Petition for Declaratory Rule, for Waiver or Other Appropriate Relief (filed March 25, 1966 in Docket No. 15971) should be consolidated for hearing with the show cause proceeding. (R. 39-63). Favorable action on this petition was denied on April 27, 1966. (R. 91-92). Buckeye again protested at both the prehearing conference (Tr. 6-8) and its hearing (Tr. 50) the unreasonably limited nature of the hearing it was to receive.

eration of the problem on the merits, it directed that this could be done only on a logical basis after considering possible extenuating circumstances. *Booth American Co., supra.*

The Court's opinion reaffirmed its previous holding in *C. J. Community Services, Inc. v. FCC*, 100 U.S. App. D.C. 379, 246 F.2d 660 (1956), "that a cease and desist order may not be predicated on the finding of a violation if the Commission has refused to consider the facts and circumstances possibly extenuating the respondent's actions." *Booth American Co., supra.* In the *C. J. Community Services* case, *supra* at 383, 246 F.2d at 664, this Court clearly pointed out that Section 312(c) of the Communications Act permits the Commission to issue a cease and desist order *only* after it has weighed the circumstances against issuing such an order. The Commission has not complied with this statutory mandate.

Furthermore, due process requires that agency determination in the nature of an adjudicatory hearing affecting private legal rights be based upon a full evidentiary hearing, involving all aspects of the public interest. *Morgan v. United States*, 304 U.S. 1 (1937); *Philadelphia Co. v. SEC*, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948). The Commission previously has given effect to this requirement of due process. For instance, in the *Evansville Deintermixture Case*,⁴⁶ a full hearing was provided on the Commission's proposal to modify the license of station WTVW. In both modification proceedings as the above case, and in cease and desist proceedings as here, the Communications Act contemplates that a full hearing will be given to parties who may suffer injury upon conclusion of the show cause hearing.⁴⁷ But here the Commission

⁴⁶ 15 Pike & Fischer RR 1573 (1957).

⁴⁷ There is virtually no distinction between the order to show cause required by Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316, to be issued in advance of a modification proceeding, and the order to show cause that Section 312(c) requires in advance of an order to cease and desist.

foreclosed itself from passing on all the circumstances significant to a determination of the public interest.⁴⁸ For this reason alone the cease and desist order cannot stand.

B. Without finding upon the record necessity for waiving Buckeye's statutory right to file exceptions to an initial decision, and in rushing Buckeye through an expedited proceeding, the Commission denied appellant a full hearing.

The expedited hearing procedure ordered by the Commission was apparently taken pursuant to Section 409 of the Communications Act.⁴⁹ This statute specifies that upon conclusion of a hearing an initial decision will be issued by the hearing examiner, and that exceptions to the initial decision shall be permitted, except (as provided in Section 409(a)) where the hearing examiner is unavailable,

"or where the Commission *finds upon the record* that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision." (Emphasis supplied). 47 U.S.C. § 409(a).

The "record" upon which a finding of necessity must be

⁴⁸In fact, the language of Chairman Hyde's concurring opinion in the *Booth American Co.* case, 5 F.C.C. 2d at 519 makes it clear that in ordering both Booth American and Buckeye to cease and desist, the Commission has not reached a determination of the public interest based upon consideration of the full factual record.

⁴⁹Section 409 of the Communications Act of 1934, as amended, 47 U.S.C. § 409, which is a general provision relating to the conduct of all adjudicatory proceedings designated for hearing. A similar provision in Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 1007(a), is applicable only to rule making and licensing, neither of which is involved in this cease and desist case. Nevertheless, appellant invites attention to this Court's recent finding that the Commission fully complied with Section 8(a) by issuing a tentative decision in place of the examiner's report. *American Trucking Associations, Inc. v. FCC*, No. 19427, p. 24 (Sept. 15, 1966).

predicated is defined in Section 7(d) of the Administrative Procedure Act as the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding . . .". This is to constitute "the exclusive record for decision."⁵⁰

In proceeding against Buckeye, however, the Commission acted in flagrant violation of these requirements. The Order to Show Cause issued on March 25, 1966, the first entry in the record of this case, directed that upon closing the record the hearing examiner shall immediately certify the record to the Commission for final decision (R. 3). Thus the Commission found necessity for an expedited proceeding against Buckeye based *not* "upon the record" as required by Section 409(a), but based upon its arbitrary prejudgment *even before the record was begun*. The Commission cannot satisfy the statutory mandate by basing its finding upon the conclusions it reached in the Second Report and Order, which is part of a completely different record from the instant proceeding. This patent violation of the specific statutory requirements clearly is unlawful and compels this Court to set aside the Commission's order. *Channel 16 of Rhode Island, Inc. v. FCC*, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956).⁵¹

Where the Commission, however, has found upon the actual record of a proceeding imperative circumstances requiring omission of an initial decision and opportunity to file exceptions thereto, this Court has affirmed the Commission's subsequent order. See, *e.g.*, *RCA Communications, Inc. v. FCC*, 99 U.S. App. D.C. 163, 238 F.2d

⁵⁰ 5 U.S.C. § 1006(d).

⁵¹ In the *Channel 16* case the procedure adopted by the Commission did not provide for the hearing examiner's initial decision to which exceptions could be filed. The Commission at no place justified this because of the hearing examiner's unavailability or a finding upon the record of necessity for an expedited proceeding, as required by both Section 409 of the Communications Act and Section 8 of the Administrative Procedure Act.

24 (1956), *affirming MacKay Radio & Telegraph Co.*, 8 Pike & Fischer 1174 (1955), *cert. denied*, 352 U.S. 1004 (1957). There the finding of necessity was based on the extensive record developed through the course of eight years of Commission and court proceedings, which furnished the Commission with "a detailed analysis of all phases of the issues involved."⁵²

The contrast between the extensive record relied upon in that case, and the complete absence of a record in the present case, makes one wonder how the Commission's decision below can term its use of Section 409(a)'s expedited procedure "manifestly proper" and in fact cite the *RCA* case.⁵³ Nor is there any support in the Commission's citation of *American Colonial Broadcasting Corp.*⁵⁴ In that case an expedited hearing was ordered only after extensive formal conferences and a full evidentiary hearing had been held. Contrary to the Commission's misplaced reliance on these two cases, they only emphasize further the supreme departure from statutory standards and the Commission's own customary practices attempted herein.

Had the Commission waited until after Buckeye's hearing was completed, and then based upon the pleadings and evidence developed thus far found necessity for immediately certifying the record to the Commission for final

⁵² *Mackay Radio & Telegraph Co.*, 8 Pike & Fischer RR 1174, 1176 (1955). In 1946 and 1947 Mackay filed applications to establish radiotelephone circuits. A hearing was held, an initial decision was issued, exceptions were filed, followed by Commission grant of the applications. This Court reversed the grant, but on certiorari the Supreme Court reversed that decision and remanded the case to the Commission. Upon remand the Commission held oral argument, conducted further hearings, and only then omitted a further initial decision and instead issued a final decision.

⁵³ 3 F.C.C.2d 70.

⁵⁴ 6 Pike & Fischer RR 2d 377 (1965).

decision, then statutory authority for an expedited proceeding might have been present. Instead, the course it adopted here in advance of even the start of the record denied Buckeye its statutory right that an initial decision by the examiner be issued with opportunity for filing of exceptions prior to the Commission's final decision.

In two other respects the Commission denied appellant the full hearing required by procedural due process.⁵⁵ First, the extremely restrictive time schedule adopted by the Commission⁵⁶ in a case involving so many novel and complex issues prevented Buckeye from adequately preparing and presenting its case. See *Brahy v. Federal Radio Commission*, 61 U.S. App. D.C. 204, 59 F.2d 879 (1932). When an agency combines the functions of prosecutor and judge, it must be especially careful to insure a full and fair hearing. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

Nor can the Commission dismiss Buckeye's legitimate request for oral argument with such careless abandon as it did below in saying "no useful purpose" could be served in granting appellant's request.⁵⁷ Contrary to the Commission's holding, this Court has fully recognized that oral argument is an essential element of due process and helps insure to interested parties the full and fair hearing protected by the Fifth Amendment. *Philadelphia Co. v. SEC*, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948); *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948).

In light of the Commission's failure to insure Buckeye its constitutional and statutory right to a full hearing on all public interest questions, its right to file exceptions to an initial decision, and its right to oral argument and

⁵⁵ *Morgan v. United States*, 304 U.S. 1 (1937).

⁵⁶ Buckeye was given only the statutory minimum thirty days to prepare for hearing and a bare seven days for submitting written briefs.

⁵⁷ 3 F.C.C.2d 804.

reasonable time to prepare its case, the Commission's cease and desist order issued against appellant is invalid.

CONCLUSION

The Commission's order requiring appellant to cease and desist from carrying the signal of television station WJIM-TV is invalid, since the hearing afforded appellant denied it due process of law and since the rules upon which this hearing was ordered were adopted in violation of constitutional and statutory standards governing rule making procedures.

Therefore, this Court should reverse the Commission's Cease and Desist Order directed against appellant and remand this case to the Commission for further proceedings consistent with this Court's opinion.

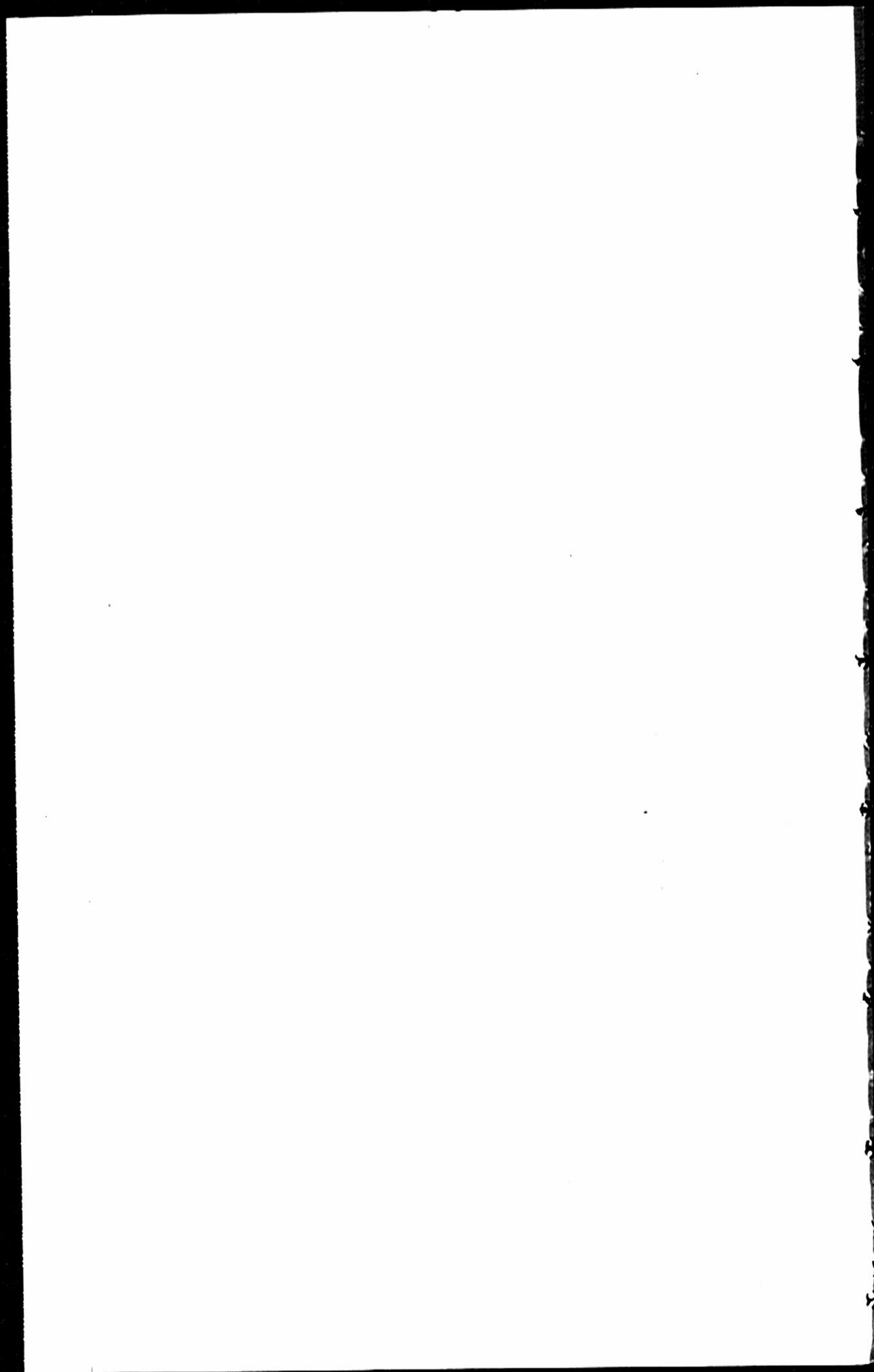
Respectfully submitted,

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September 26, 1966



APPENDIX

STATUTES AND COMMISSION RULES INVOLVED

Administrative Procedure Act § 4, 5 U.S.C. § 1003.

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the

agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

* * *

Sections 312(b), (c) and 409(a), (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(b), (c); 409(a), (b).

ADMINISTRATIVE SANCTIONS

Sec. 312.

* * *

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon

said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

* * *

General Provisions Relating to Proceedings— Witnesses and Depositions

Sec. 409. (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any to whom the function of passing upon the exceptions is delegated under section 5(d)(1): *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

* * *

Section 74.1101(i) and Section 74.1107 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1101(i), 74.1107.

§ 74.1101 Definitions.

* * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the

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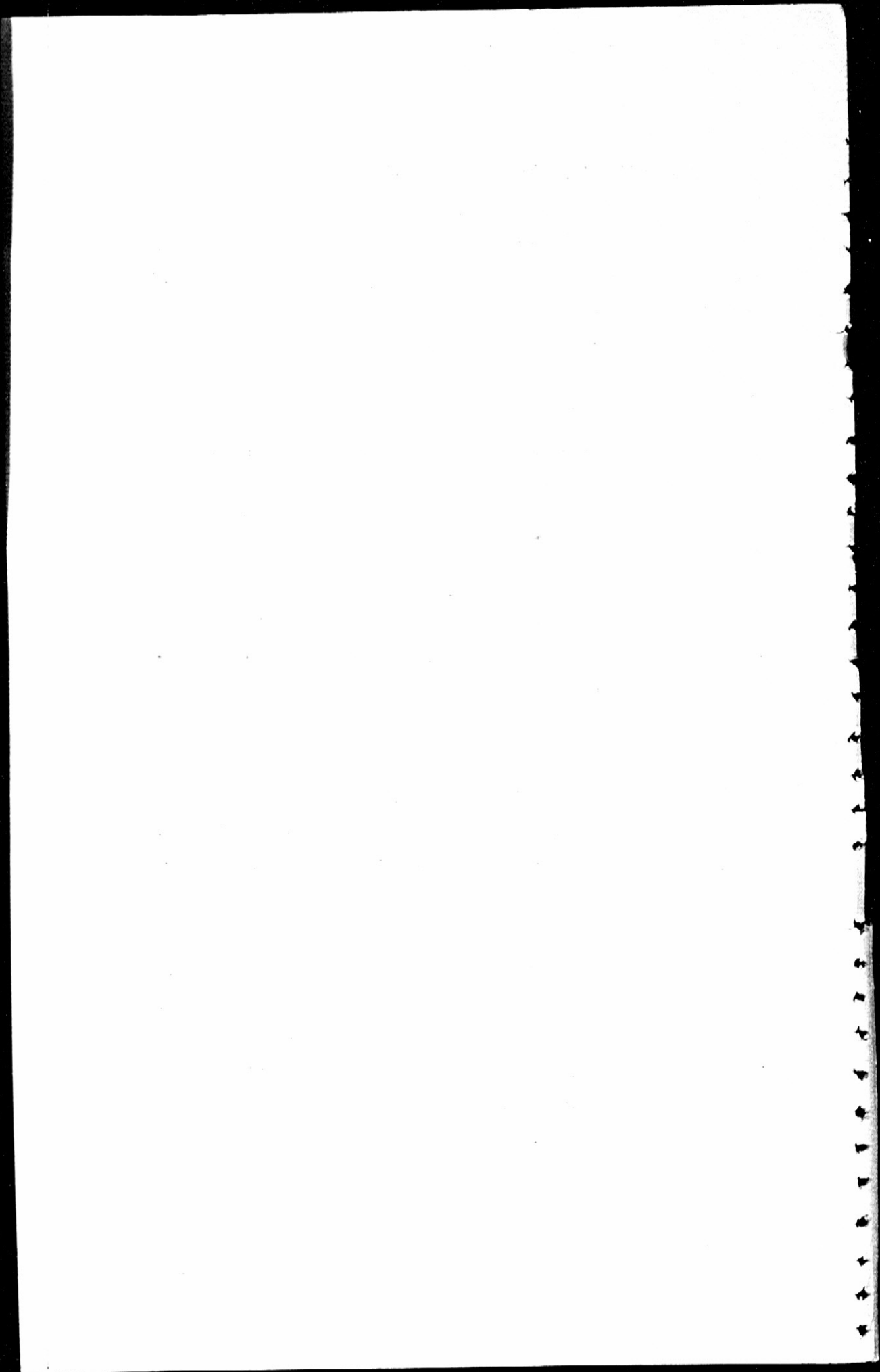
public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of

App. 6

the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.



SUPPLEMENTAL BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee,

D. H. OVERMYER TELECASTING CO.,

STORER BROADCASTING CO., and

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 19 1967

Nathan J. Paulson
CLERK

**Robert A. Marmet
Peter L. Koff**

**1822 Jefferson Place
Washington, D. C. 20036**

Counsel for Appellant

January 19, 1967

(i)

QUESTION PRESENTED

Whether the Federal Communications Commission has statutory authority to exercise jurisdiction over the distribution of television signals received off-the-air by a community antenna television (CATV) system which is located wholly within one state.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPEAL FROM AN ORDER OF THE
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SUPPLEMENTAL BRIEF FOR APPELLANT

I.

Preliminary Statement

Oral argument in the instant appeal was held on January 9, 1967 before a three-judge panel consisting of Chief Judge Bazelon, Senior Circuit Judge Prettyman, and Circuit Judge Danaher. During the course of oral argument, Chief Judge Bazelon directed that appellant

would have ten days to brief the question of the jurisdiction of the Federal Communications Commission to regulate off-the-air CATV systems, or this issue will be considered waived for purposes of the instant appeal. Appellant, therefore, is filing herewith its Supplemental Brief directed solely to this one question.

The issue which is being briefed herein may be stated as follows: Does the Federal Communications Commission have statutory authority to exercise jurisdiction over the distribution of television signals received off-the-air by a community antenna television (CATV) system which is located wholly within one state?

II.

The Federal Communications Commission Lacks Statutory Jurisdiction To Regulate CATV Systems Located Wholly Within One State Which Receive All Their Signals Off-the-Air.

The Federal Communications Commission, like other Federal administrative agencies, is a creature of Congress.¹ It was established by the Communications Act of 1934, 66 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.*, and it is solely under this Act of Congress, as amended, that the Commission has been given jurisdiction to regulate specific aspects of the communications industry. *Regents of Georgia v. Carroll*, 338 U.S. 586, 593, 597-99 (1950).

Also like other Federal agencies, therefore, the Commission is a tribunal of limited jurisdiction. It is powerless to confer jurisdiction on itself, and its jurisdiction derives solely from the statute which grants and limits its powers. See, *e.g.*, *CAB v. Delta Air Lines*, *supra* n. 1; *Regents of Georgia v. Carroll*, *supra*; *Trans-*

¹ See, *e.g.*, *CAB v. Delta Air Lines*, 367 U.S. 316, 322 (1961).

Pacific Freight Conference v. Federal Maritime Board, 112 U.S. App. D.C. 290, 302 F.2d 875 (1962). Since "an administrative agency can exercise only those powers conferred on it by Congress,"² the determinative question is not what the agency thinks it should do "but what Congress has said it can do." *CAB v. Delta Air Lines*, *supra*.

Therefore, the jurisdiction of the Federal Communications Commission to regulate off-the-air CATV systems must be found within the act which grants and limits its powers, the Communications Act of 1934, as amended. If it is not found there, it clearly follows that the Congress has yet to delegate that responsibility to the Commission, for the Commission's jurisdiction in a questionable area can not be presumed. See *Regents of Georgia v. Carroll*, *supra*; *Trans-Pacific Freight Conference*, *supra* n. 2.

A. Since CATV Systems Are Neither Common Carriers Nor Subject to the Commission's Licensing Function, Statutory Authority To Support Their Regulation Is Not Found in the Communications Act.

In creating the Federal Communications Commission, and in conferring upon it jurisdiction over certain aspects of interstate and foreign commerce in communications, the Congress took two distinct approaches. First, in Title II of the Act, it gave the Commission authority over "common carriers" engaged in interstate and foreign communications by wire or radio, such as telephone and telegraph companies, and provided for a traditional "public utility" type of regulation.³ Secondly,

² *Trans-Pacific Freight Conference*, *supra*, 112 U.S. App. D.C. at 295.

³ The common carriers subject to Commission regulation, as set forth in Title II, are required to obtain certificates of public convenience and necessity (Section 214), must file their

it gave the Commission jurisdiction over the field of "radio broadcasting" and provided that licensing of radio transmitters, in accordance with the public convenience, interest and necessity, would be the method of regulation. *Regents of Georgia v. Carroll, supra.*

The Commission has consistently held that CATV systems are not "common carriers" within the meaning of Title II, an interpretation of the Communications Act which this Court has approved.⁴ Instead, the Commission has chosen to base its asserted jurisdiction over CATV systems upon the statutory scheme embodied in Title III of the Act, since CATV systems allegedly have a close relationship to and potentially adverse effect on television broadcast stations which fall within the Commission's licensing powers under Title III.

It must be emphasized, however, that the Commission's authority to regulate pursuant to the powers it has been given under Title III is not unbounded. The Commission's licensing function in Title III not only serves as the precise regulatory scheme chosen by Congress for management of the radio spectrum, but, in addition, *the licensing function defines the very extent to which the Commission's authority under Title III is to be applied.* *Regents of Georgia v. Carroll, supra.*

The Commission, in attempting to show that it does in fact have statutory jurisdiction to regulate off-the-air CATV systems, concedes that the licensing provisions of Title III are inapplicable to CATV systems. *Second Report and Order*, Docket Nos. 14895, 15233, 15971, 2 F.C.C. 2d 725, 730 (1966). Apparently overlooking the Supreme Court's teaching in the *Regents of Georgia* case, however, the Commission goes on to justify its

rates and charges with the Commission (Section 203), and in other ways are subject to regulation in the traditional sense of a public utility.

⁴ *Philadelphia Television Broadcasting Co. v. FCC.*, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966).

assertion of jurisdiction because of the allegedly broad statements of purpose, application, and definition contained in Title I of the Act (Sections 1, 2, and 3); because of the Commission's general rule making authority (Sections 4(i) and 304(f) and (r)); and because CATV systems have a "uniquely close relationship to the regulatory scheme embodied in [S]ections 303(b) and 307(b)" of the Act. *Second Report and Order, supra*, 2 F.C.C. 2d at 728-32; *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 15971, 1 F.C.C. 2d 453, 478-82 (Appendix B - "Commission's Memorandum on Its Jurisdiction and Authority").

It is clear, however, that the Commission's general rule making powers in and of themselves do not confer jurisdiction on the Commission to regulate off-the-air CATV systems. These provisions must be interpreted with, and have meaning only as directly related to, the Commission's delegated authority to license radio stations. *Regents of Georgia v. Carroll, supra*. Nor can the Commission validly rely on statements of purpose, definition, or application contained in sections of Title I of the Act, since these sections, by their very own terms, must be interpreted consistently with the rest of the Act. It is in other places in the Act, Titles II and III in particular, that the specific grants and limitations on the Commission's powers are found.

The Commission's assertion of jurisdiction is perhaps based most heavily upon the proposition that regulation of off-the-air CATV systems is necessary in order to prevent frustration of the licensing policies of the Commission adopted pursuant to Section 307(b) of the Act. Not only does the Commission fail to justify this proposition with detailed factual documentation,⁵

⁵ The rules contained in the Second Report and Order were intended to freeze the status quo so that specific factual determinations could thereupon be made before CATV systems become well established. See, e.g., *Second Report and Order*, ¶¶ 147-148.

but Section 307(b) itself is specifically limited to the licensing and regulation of broadcasting stations. It does not confer any authority on the Commission except as directly related to the issuance of broadcasting licenses.

Buckeye Cablevision, Inc. and other off-the-air CATV systems have no need for a Commission license, since they neither use nor rely on radio frequencies to supply their service to individual customers. These CATV systems pick their signals up directly off the air without use of microwave relay stations, and the signals are transmitted to individual homes via cable or wire connections. Clearly, therefore, they cannot be subject to licensing under Title III, nor can they indirectly be subjected to Commission regulation simply because they have an allegedly unique relationship to television stations which are licensed by the Commission. In fact, CATV systems have no more of a unique relationship to television stations than do individual home viewers.

In conclusion, the Commission has attempted to assert jurisdiction over off-the-air CATV systems which neither are "common carriers" nor entities subject to the Commission's licensing powers, and which are not served by microwave stations subject to the Commission's licensing power. Such assertion of jurisdiction is a wholly unauthorized exercise of Commission power under the terms of the statute which has created the Commission and which grants and limits the scope of the Commission's authority.

B. The Commission Has No Statutory Authority To Control the Reception of Radio Signals.

Until the adoption of the rules and regulations at issue here, the Commission has never attempted to claim that it is empowered under the Communications Act to control the *reception* of radio signals and their *dissemination* by wire, where no facilities subject to Commission

licensing are to be used at any point in the process of reception and distribution. To the contrary, the Commission heretofore has recognized that its powers under the Communications Act stem entirely from its delegated authority to maintain an orderly use of the radio spectrum, and it is toward that end that the Commission may allocate the scarce radio channels and require potential *users* to meet certain rules and regulations.

Now, however, for the first time the Commission has claimed that it has authority, under the Communications Act, to prohibit intrastate CATV systems *not* from transmitting radio energy contrary to certain rules or standards, but from *receiving* signals it can pick up off the air and from transmitting these signals via wire to the homes of individual viewers. The Commission, in effect, has told the viewers what television signals they may receive, rather than telling potential users of the scarce radio spectrum what channels, if any, they may broadcast on and under what conditions such radiations of energy will be permissible. Clearly, however, the Communications Act was not written so broadly as the Commission would seek to maintain.⁶

C. The Commission Has No Statutory Authority To Regulate CATV Systems Not Engaged in an Interstate Communication Service.

In addition, the operations of Buckeye and other similar CATV systems which operate wholly within the confines of one state, and whose physical facilities are located in only one state, are not subject to the jurisdiction of the Commission. In order for the Commission to have jurisdiction over CATV systems, Section 2(a) of the Act

⁶ In fact, a search of judicial authority has failed to turn up any decisions sanctioning an interpretation of the Communications Act so broad as to give the Commission power to control the reception of radio or television signals, as distinct from their transmission.

makes clear that the CATV system would have to be engaged in "interstate communication by wire."

Buckeye is not engaged in such an interstate communications service. Its physical plant is located wholly within the State of Ohio. Its customers all reside in Ohio. The service it renders, distributing to individual homes the television signals available off-the-air in Toledo, Ohio, takes place entirely within the confines of one state.

It is wholly irrelevant that Buckeye may serve as a "connecting link" in the chain of communication of television signals which originate outside the State of Ohio.⁷ That is not the point. The relevant inquiry is whether the actual service of a CATV system such as Buckeye — *distribution* of television signals — takes place entirely within one state. If so, then the CATV system is not engaged in an interstate communications service.

CONCLUSION

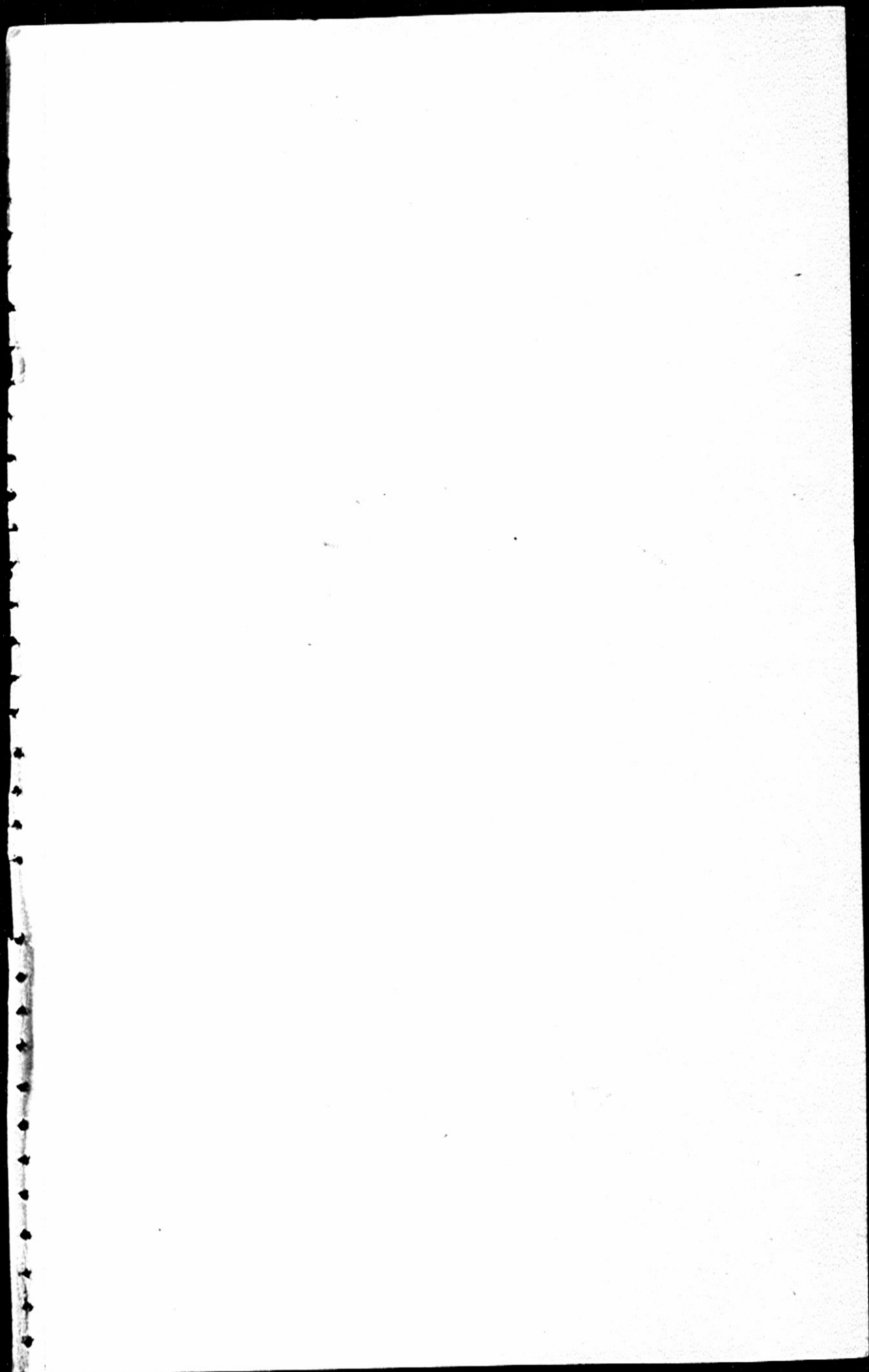
For the above reasons, in addition to those set forth in appellant's opening brief, the rules adopted in the Second Report and Order are invalid, and the order below should therefore be set aside.

Respectfully submitted,

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January 19, 1967

⁷ The Commission's decision in *Capital City Telephone Co.*, 3 F.C.C. 189 (1936), does not give it authority to hold otherwise, since in that case the "connecting link" was a "common carrier" subject to Commission regulation under Title II of the Act.



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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

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v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,
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FILED NOV 25 1966

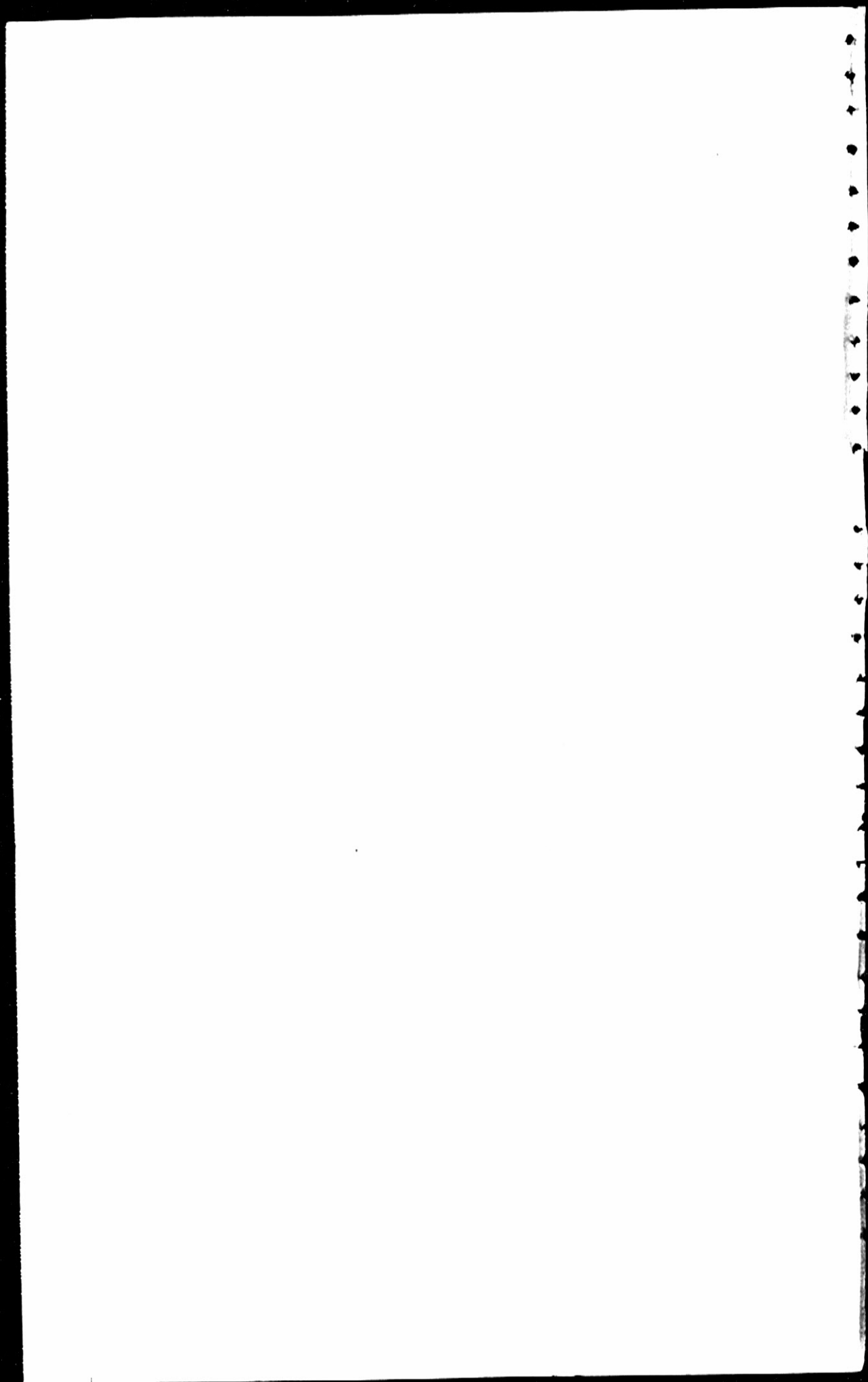
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November 25, 1966



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

I.

Preliminary Statement

Buckeye Cablevision, Inc. herewith files this Reply Brief in response to the Brief for Appellee (Federal Communications Commission) and in response to the supporting briefs of Intervenors D. H. Overmyer Telecasting Co., Storer Broadcasting Co., and Association

of Maximum Service Telecasters, Inc. (hereinafter cited AMST).¹

This Court's attention must first be directed to a preliminary matter of great importance. The Commission's Counterstatement of the Case may be misleading concerning the relevant facts of this appeal, in a statement it makes on page 10 of Appellee's Brief. Buckeye Cablevision is not now carrying the signal of WJIM-TV, Lansing, Michigan, nor has Buckeye at any time carried this signal after the Commission's Order to Buckeye to cease and desist from its carriage. Ever since that Order was issued Buckeye has been, and is now, in full compliance with the Order and with all Commission Rules and Regulations, even those whose validity Buckeye has contested and is now challenging on appeal.

A second and also highly important preliminary matter, to which this Court's attention is directed, is the rather novel and misdirected attempt by appellee (Br. ii) and Intervenor Storer (Br. 5-6) to claim Buckeye has conceded, for purposes of this appeal, the Commission's jurisdiction to regulate all CATV systems. This simply is not the case.

The Preliminary Statement in Buckeye's opening Brief (Br. i-ii) clearly pointed out that appellant was reserving the right to challenge the Commission's jurisdiction over off-the-air CATV systems, upon the outcome of appeals directly attacking this jurisdiction which

¹ The brief of Intervenor D. H. Overmyer Telecasting, Inc. is not responsive to the many specific arguments raised in appellant's Brief. Overmyer presents little more than a short enumeration of its own argument that "The adoption of the CATV rules represents a wholly proper exercise of the Commission's broad regulatory authority." For this reason, Buckeye's responses are not directed at any specific assertions of Overmyer. In alluding to arguments of the other two intervenors and to those of appellee, appellant's Reply Brief refers to them collectively as "opposing parties," and their respective briefs as "opposing briefs."

were transferred by this Court to the Eighth Circuit Court of Appeals.² Buckeye, it should be remembered, had moved this Court to hold the instant appeal in abeyance pending outcome of Eighth Circuit litigation, where the basic decision on the issue of jurisdiction is to be made. In opposing Buckeye's request, the Commission pointed out the instant appeal presented issues not present in the Eighth Circuit litigation, such as procedural error and arbitrary action in connection with the issuance of the cease and desist order. Buckeye's motion to hold this appeal in abeyance was therefore denied by this Court.

In declining to brief the question of jurisdiction, while reserving the right to do so at a later date, Buckeye may not now be held to have waived this right and to have conceded the jurisdiction issue for purposes of this appeal. Neither the Commission nor Storer has shown otherwise. In support of its claim, however, appellee cites Rule 17(g) of the Rules of this Court. That Rule, however, says nothing about waiver. It merely states that points not presented to the Court "will be disregarded" for decisional purposes, except for "plain error" noticed by the Court at its own option. Nor is Storer's argument any more convincing. It is merely a shot-gun citation of a number of completely unrelated cases that, by Storer's own admission, have little similarity to the instance situation.

It is submitted that appellant's desire to insure the orderly resolution of the enormously complex question of Commission jurisdiction over all CATV systems should in no sense preclude it, if necessary, from raising this issue after completion of the Eighth Circuit litigation.

² These appeals from the Commission's Second Report and Order were transferred to the Eighth Circuit where appeals from the First Report and Order were already pending.

II.

**The New CATV Rules Unreasonably Restrain
Appellant's Rights To Disseminate Knowledge
Free From Governmental Interference.**

Appellant's opening Brief pointed out that the Commission's new CATV rules violate Buckeye's First Amendment rights for two distinct reasons: the Commission has failed to justify that the new rules are necessary in the public interest; and even if so, the rules go far beyond their alleged objective and instead impose an unnecessary system of prior restraints on the free dissemination of knowledge. (Br. 12-16). In response, opposing briefs argue that the new rules are merely reasonable regulations, that the regulations are reasonably related to valid public interest objectives, and that for these reasons the rules do not infringe upon any constitutionally protected rights of free speech.³

These arguments miss the point entirely. What appellant objects to is the wholesale fashion in which it is precluded from carrying all television signals it can receive off-the-air, while citizens in Toledo are free to erect antennas of their own to bring in the very same signals Buckeye cannot carry. This obvious discrimination is not condoned under the First Amendment nor under even the broadest of readings of the *NBC* case, *supra* n. 3. Appellee continually stresses the possibility that this restraint on Buckeye will one day be relaxed *after* a hearing on the local situation in Toledo. But such conjecture fails to compensate either Buckeye or the citizens of Toledo for the already substantial loss of

³ In support thereof, opposing parties heavily rely on an interpretation of *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), to the effect that any regulation related in some way, however remote, to the use of the radio spectrum is a valid exercise of Commission authority, even if it impedes the free distribution of knowledge and information. This case has never stood for such a broad proposition.

television service they have been forced to accept by the Commission's cease and desist order to Buckeye.

III.

The Commission Cannot Justify the Arbitrary and Sudden Rush Toward Rule Making Which Marked Its Adoption of the New CATV Rules, After Being Reluctant for So Long To Come to Grips With the CATV Industry, and Then at Long Last Deciding a Problem Was at Hand.

The rule making proceeding under attack in this appeal is a patent example of bad agency regulation, and nothing advanced in the briefs of appellee or intervenors shows this to be otherwise. In fact, in reading the various explanations opposing parties have offered, the magnitude of the Commission's errors becomes even clearer. One theme dominates these explanations: Marked by inaction and confusion, the Commission stood idly by while the CATV industry greatly expanded in the late 1950's and early 1960's; suddenly, much too late, the Commission at last realized that it was faced with a still mushrooming CATV industry that might interfere with its scheme of VHF and UHF television allocations; and consequently, the Commission decided immediate and drastic steps were necessary to preserve the status quo.

- A. **The Very Most That Can Be Said for the Notice of Inquiry Is That It Was Highly Confusing as to the Commission's Intended Course of Action.**
-

Appellee and supporting intervenors have outlined the course of the Commission's adoption of the Second Report and Order, in an attempt to persuade this Court that all statutory and constitutional guarantees of procedural fairness were fully complied with. Their explanations simply are not persuasive.

In the first place, it is openly conceded by the Commission (Br. 25-26), by AMST (Br. 16 n. 14), and by Storer (Br. 12) what is well documented in appellant's Brief (Br. 18-20): that the Commission, in issuing its Notice of Inquiry, admitted that it had insufficient knowledge upon which to base specific rule proposals, let alone final rules affecting millions of dollars of investments; that it was toward this fact-gathering end that the present inquiry would be directed; and that in all likelihood a further notice of rule making will be issued to provide opportunity for comment on specific rule proposals. These promises were never fulfilled.

The argument is made in opposing briefs, however, that along with the above reservations as to the limited nature of the present inquiry, the Commission warned that if it found necessary in the public interest to adopt final rules without further action, it would take appropriate action. Indeed, the Commission did so state in issuing its Notice of Inquiry. But this only strengthens appellant's contention that the Notice of Inquiry was highly confusing and contradictory, and that the public was not apprised in sufficiently clear terms what course of action the Commission would take. Certainly interested parties were not given "adequate notice" as used in Section 4(a) of the APA and upon which these parties could safely base their actions.

Intervenor Storer (Br. 13), however, attempts to characterize agency rule making as a poker game, saying Buckeye "gambled and lost" in not filing comments in the CATV proceeding and in not believing that sudden regulation of all CATV systems was imminent. But is not the procedural fairness guaranteed by the APA directed against just this sort of "poker game" atmosphere, substituting instead full and fair notice upon which interested parties can rely in good faith? Most assuredly that is the purpose of the Administrative Procedure Act and the due process guarantees it stands to protect.

Nor did the Notice of Inquiry specify in sufficient detail the substantive nature of the rules the Commission would adopt. Since the Commission readily admitted it had insufficient facts upon which to base *rule proposals*,⁴ one can't help wondering how it was able to sift the myriad of conflicting comments filed in response to the Second Report and Order in time to come out so swiftly with *final rules*.⁵ Appellant has already conceded that Section 4(a), literally applied, does not require the exact terms of proposed rules to be issued in advance of their adoption. But in light of the tremendous impact that the new CATV rules were to have upon the millions of dollars of investments undertaken without knowledge that federal regulation was imminent, it was reasonable to think that specific rule proposals would be issued upon which specific comments and suggestions could be directed.

B. "Administrative Discretion" Is No Answer to the Lack of Hearing or Oral Argument Preceding Adoption of the CATV Rules; Nor Can This Defect Be Cured by a Section 74.1107 Hearing.

Appellant has urged (Br. 22-25) that the Commission's failure to provide a full evidentiary hearing or oral argument prior to adoption of the new CATV Rules deprived interested parties such as Buckeye of the full hearing envisioned by Section 4(b) of the Administrative Procedure Act. In response, the Commission (Br. 32), Storer (Br. 14), and AMST (Br. 18-19) all attempt to cover up this arbitrary short-coming under the vague concept of "administrative discretion."

⁴ Second Report and Order, § 64.

⁵ The fact that AMST filed written comments in response to the Notice of Inquiry fails to cure the notice defects pointed out by appellant.

Clearly, however, administrative agencies can abuse the discretion with which they are trusted, in which case this Court stands ready to protect the public from administrative oversight. See, e.g., *American Airlines, Inc. v. CAB*, ___ U.S. App. D.C. ___, 359 F.2d 624, *cert. denied*, 385 U.S. ___, 87 S.Ct. 73 (1966). Just such an abuse marks the Commission's adoption of the Second Report and Order. When, as here, so many diverse and antagonistic written comments are received in response to a notice of proposed rule making, the benefits of an evidentiary hearing or oral argument as an aid to clarifying and synthesizing the written inconsistencies seem too obvious to belabor. It is precisely for this reason that adoption of new CATV rules in such a hotly contested atmosphere should have been preceded by oral argument or evidentiary hearing. Anything less sacrifices the due process protections of the Fifth Amendment and Section 4(a) of the APA. *American Airlines v. CAB*, *supra*.⁶

Nor can the ponderous hearing procedure set forth in Section 74.1107 of the Commission's Rules cure this basic defect in the Commission's earlier proceedings. Individual adjudicatory proceedings *after* misguided adoption of new regulations is no substitute for the full hearing that should have preceded their adoption and that would have guided the administrative agency in a more rational direction. Here the Commission lacked this necessary guidance. Furthermore, the so-called Section 74.1107 hearing requirement is so "extremely arbitrary and excessively burdensome on a CATV applicant" that a serious question arises as to how fair

⁶ It is interesting to note that neither the Commission nor Storer attempt to distinguish this case, whose teaching is relied on heavily by appellant. AMST's attempted distinction (Br. 19-20) is ineffective and begs the question by saying oral testimony was unnecessary since written evidence was already voluminous.

even that hearing would be.⁷ *Booth American Co. v. FCC*, 4 F.C.C. 509, 520 (1966) (dissenting statement of Commissioner Bartley).

C. The Retroactive "Grandfather" Provision of Section 74.1107 Is Unlawful, and This Rule Has Been Implemented Contary to the Provisions of Section 4(c) of the APA.

In response to Buckeye's contentions that Section 74.1107 is in practical operation an unlawful retroactive rule made effective sooner than Section 4(c) of the APA permits (Br. 25-32), appellee and intervenors advance some novel suggestions. They allege that Section 74.1107 is not retroactive at all, and what appellant really objects to is both the cut-off date and the immediate implementation of this rule, allegedly necessitated by the extraordinary construction efforts that otherwise would have made effective regulation impossible.

Clearly, however, much more than a mere "grandfather" provision, reasonable and necessary under the circumstances, is incorporated into Section 74.1107. Under this rule, a CATV system's legal right to carry all signals available off-the-air is determined not as of the date the rule was first published or even first released, but as of some arbitrary cut-off date well before the text of the rule was even first written, and a full sixty-two days ahead of when this rule normally could be made effective. Its retroactive nature is obvious. This is clear even using the definition of retroactivity relied on by opposing parties, since Section 74.1107 unmistakably attaches severe legal consequences (cease and desist proceedings) to activities engaged in (first

⁷ To date the Commission has failed to even approach a start toward resolving the tremendous backlog of requests for hearing, which will necessitate the Commission taking a less than ideal approach of "wholesale settlement" of numbers of cases at a time. See *Broadcasting*, Oct. 31, 1966, p. 52.

carriage of signals of less than Grade B strength) prior to adoption of the new CATV rules (on March 17, 1966).⁸

What makes Section 74.1107 an *unlawful* retroactive rule is the arbitrary and discriminatory nature of the alleged cut-off date. After years of planning and substantial financial expenditures and commitments, many CATV systems (such as Buckeye) which had long ago counted on carrying all signals available off-the-air were suddenly left out in the cold, unless, by some stroke of luck, they had been able to begin service by the meaningless February 15, 1966 deadline. Buckeye was not so fortunate. It began service March 16, 1966, after incurring numerous unforeseen delays. Then the very next day its conduct apparently became unlawful and the subject of a cease and desist order. The discriminatory effect of this rule leaves little to one's imagination, even from considering just this one example.

Furthermore, the alleged showing of "good cause" for waiving the thirty day publication requirements of Section 4(c) of the APA is hinged entirely on the Commission's grandiose assumptions as to the wisdom of its grandfathering provision. It is apparent, however, that this showing also fails to consider the massive disruption to existing CATV systems and contractual relationships caused by the Commission's arbitrary scheme of implementing the grandfathering provisions of Section 74.1107.

The Commission has contended that unless it acted in such drastic fashion, it would have completely lost hold of the status quo and have been unable to preserve the public interest as against the mushrooming CATV

⁸ The mere fact that between February 15, 1966 and March 16, 1966 the Commission could not enforce its new CATV rules in no way determines the question of retroactivity. That line of reasoning is wholly irrelevant.

industry. What the Commission really is saying, however, is that it needs an excuse for its previous inaction, indecision, and inability to come to grips, one way or another, with the problems presented by CATV systems, which certainly were no sudden phenomenon except, possibly, in the eyes of the Commission.

IV.

**The Cease and Desist Order Is Invalid:
Buckeye Was Not Accorded a Full Hearing,
and the Commission in Ordering an
Expedited Hearing Violated Section 409(a)
of the Communications Act.**

Buckeye's harshly abbreviated show cause proceeding was so violative of the fundamental guarantees of procedural fairness that detailed reiteration of this point is not necessary. The basic facts remain: on March 16, 1966 Buckeye commenced operations⁹ in full compliance with all existing laws and regulations; this same conduct, the very next day, suddenly became illegal; and within a mere week's time appellant was summarily ordered to prepare for an expedited show cause proceeding so restricted in its scope that any exploration of the public interest was missing completely.

Appellee and intervenors, however, urge that the restricted scope of the hearing was a reasonable judgment of the Commission which it found to be necessary in the public interest. It is their contention that neither case law nor statutory requirements show this to be otherwise. They are wrong.

While one may quibble with the precise factual bases

⁹ The statement of Intervenor Storer (Br. 11 n. 10) that Buckeye began operations on this date only on a test basis is completely unsupported by the full record and by both appellant's Statement of the Case and appellee's Counterstatement of the Case.

of the two cases urged in support of Buckeye's position,¹⁰ the teaching of these cases and the relevant statute¹¹ is clear: only after the Commission has explored all facets of the public interest does Section 312(c) permit the issuance of a cease and desist order. This basic requirement of due process was never followed. Rather, Buckeye's repeated attempts to insure a full and fair hearing fell upon deaf ears. The Commission obviously was more concerned with enforcing its new rules than with insuring that the party it proceeded against was given the fairness of treatment due process demands.

In addition, Buckeye has never asserted that the Commission is not authorized under Section 409(a) of the Communications Act to order an expedited hearing procedure when the public interest requires *and* when the statutory requirements of Section 409(a) are followed. But when, as here, the Commission has proceeded in flagrant violation of these standards, its cease and desist order cannot stand. *Channel 16 of Rhode Island, Inc. v. FCC*, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956).

What appellant objects to is that the Commission, when it ordered an expedited hearing procedure, did not have any record of the instant proceeding upon which to base its finding of necessity, as required by Section 409(a). Clearly, the exclusive record upon which this finding is to be made is the record of the current proceeding, as required by Section 7(d) of the Administrative Procedure Act, and not some other Commission proceedings to which respondent has not been a party.

Appellee attempts to ignore this requirement by saying the Commission's findings were indeed based upon

¹⁰ *Booth American Co. v. FCC*, D.C. Cir. No. 20,367 (1966); *C. J. Community Services v. FCC*, 100 U.S. App. D.C. 379, 246 F.2d 660 (1956).

¹¹ Section 312(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(c).

"information in its possession" and that in its order to Buckeye to cease and desist its findings were in fact "recited on the record." (Br. 46, 49). But this misses the point entirely. Nor is Intervenor Storer's argument any less irrelevant (Br. 19-20), for the plain meaning of Section 409(a) does not allow for an expedited decision whenever *any* record before the Commission shows this to be imperative. Neither appellee nor Storer have cited any case where such a novel procedure, violative of the clear requirements of Section 409(a), has been attempted and sustained. It cannot be in this case.

CONCLUSION

For the foregoing reasons and for the reasons stated in appellant's opening Brief, the Commission's Order to Buckeye to cease and desist from carrying the signal of television station WJIM-TV is invalid and should be reversed, and this case should be remanded to the Commission for further proceedings consistent with this Court's opinion.

Respectfully submitted,

Robert A. Marmet
Peter L. Koff

Counsel for Appellant

November 25, 1966

DLB-P-0
1/9/67
(3)

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

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Appellant,

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Intervenors.

ON APPEAL FROM A DECISION OF THE
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United States Court of Appeals
for the District of Columbia Circuit

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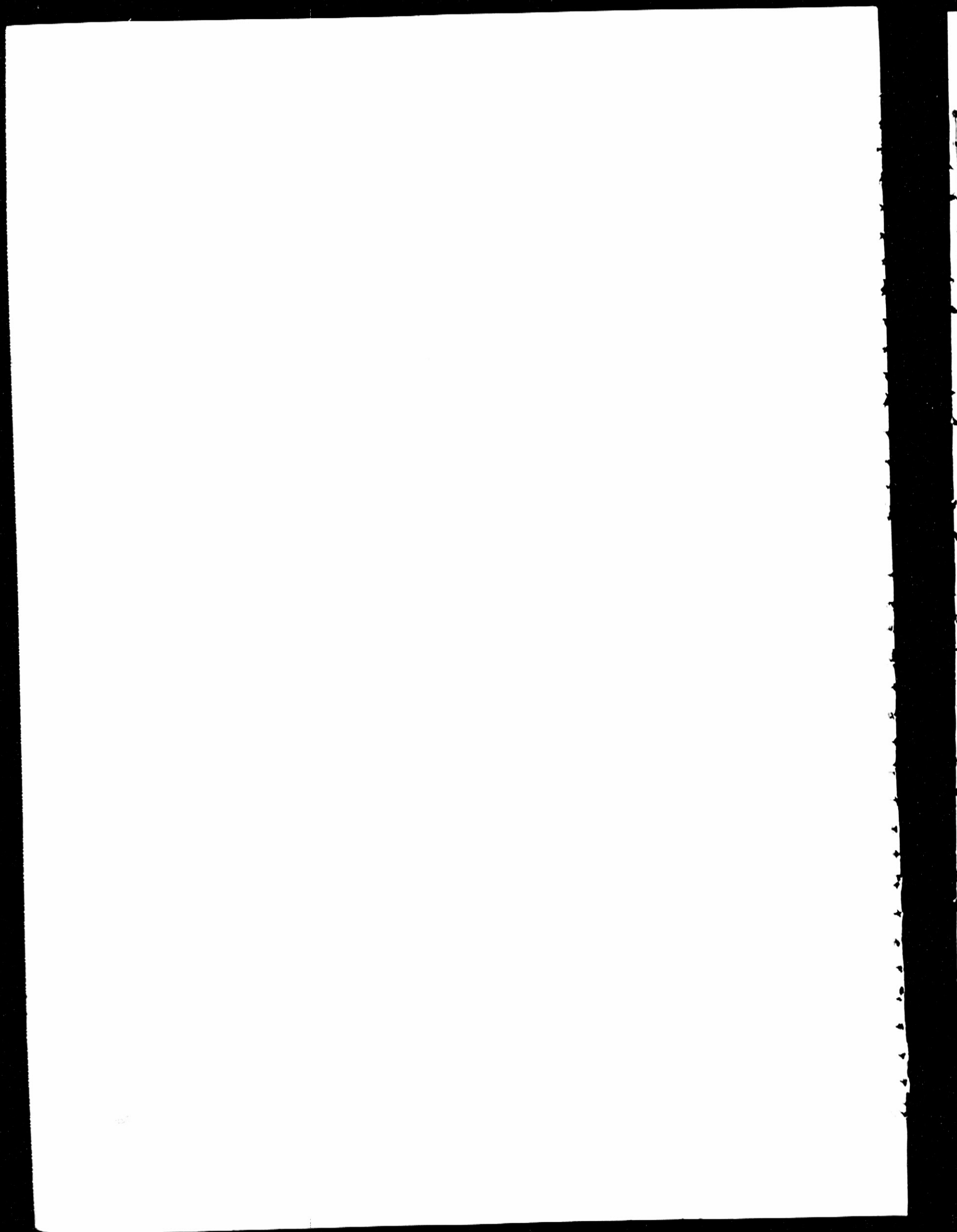
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STATEMENT OF QUESTIONS PRESENTED

Although no prehearing stipulation was entered into by the parties hereto as to the questions presented by this appeal, appellee accepts appellant's indication of the questions presented, as follows:

1. Whether the adoption of certain new community antenna (CATV) rules by the Federal Communications Commission and their application to appellant constitute an unreasonable prior restraint on appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

2. Whether the Commission failed to give appellant and other interested parties adequate notice and adequate opportunity to comment upon provisions of the new CATV rules, in violation of Sections 4(a) and 4(b) of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. Whether Section 74.1107 is an unlawful retroactive rule, and the Commission in implementing this rule failed to show "good cause" for waiving Section 4(c) of the Administrative Procedure Act.

4. Whether by restricting the scope of appellant's hearing and by ordering an expedited hearing procedure, the Commission arbitrarily and unreasonably violated appellant's statutory and constitutional right to a full and fair hearing.

Appellant indicates in a Preliminary Statement (Br. i-ii) that, for purposes of this brief, it "will assume, without accepting, that the Commission's assertion of jurisdiction is valid." It reserves the right, however, should this Court reach a decision unfavorable to its position, to argue the jurisdictional question upon conclusion of the pending litigation in the United States Court of Appeals for the Eighth Circuit challenging the validity of the Commission's Second Report and Order.

It is appellee's position that, the jurisdictional question not having been briefed, it has been abandoned. General Rules of the Court, Rule 17(g).

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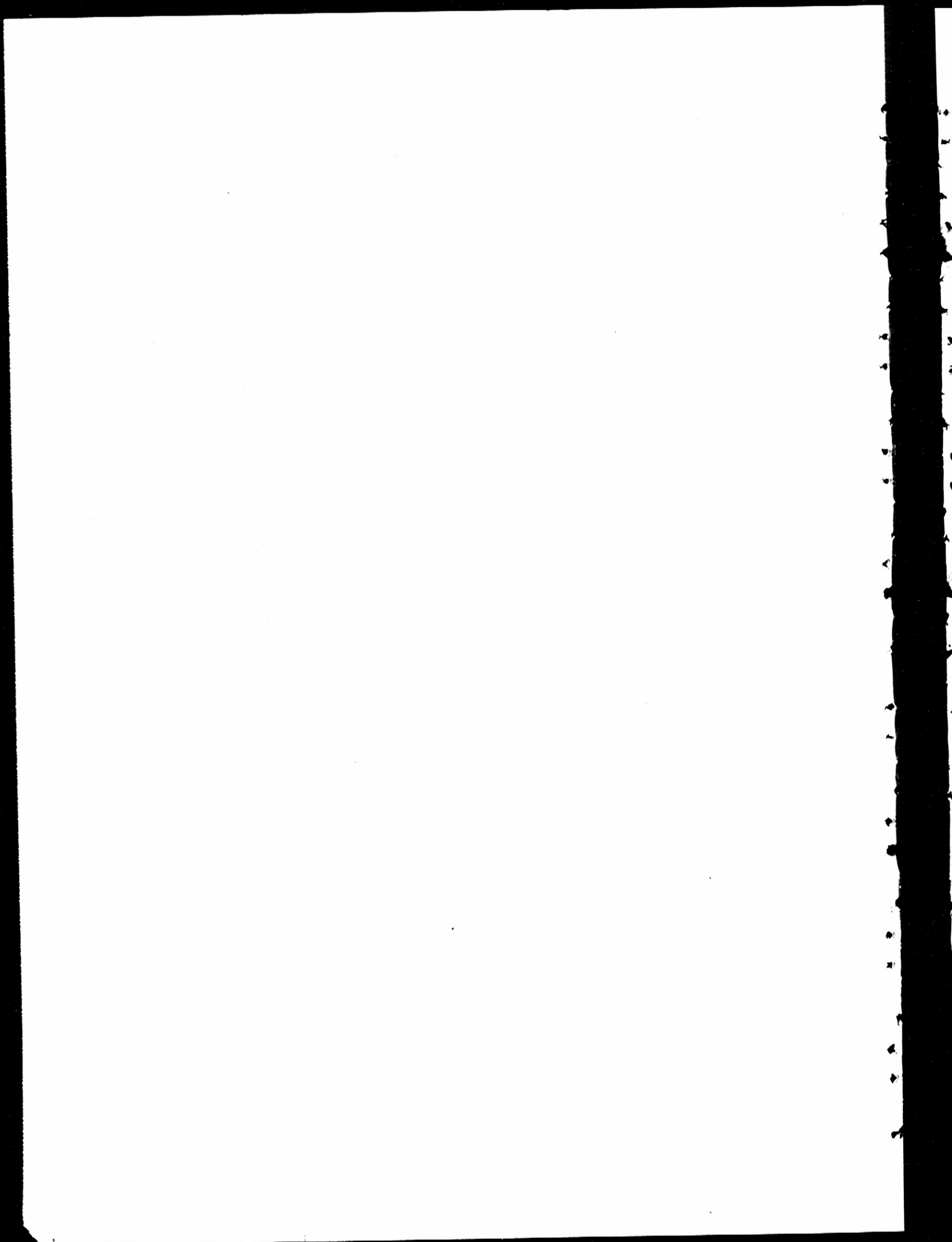
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Intervenors.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 402(b), and Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009. It seeks review of a decision of the Commission released May 27, 1966, 3 F.C.C. 2d 798, which found that appellant's importation into Toledo, Ohio, by its community

antenna television (CATV) system of the signal of television station WJIM, Lansing, Michigan, was in violation of Section 74.1107 of the Commission's Rules, 2 F.C.C. 2d at 804-805.

Appellant was ordered to cease and desist from such violation.

We believe that a counterstatement of facts is necessary to provide the Court with a more complete and accurate statement of this case than has been supplied by appellant. We shall first set forth the considerations which led to the adoption of Section 74.1107, and then turn to the cease and desist proceeding which gave rise to this appeal.

I. The Rulemaking Proceeding.

Originally, community antenna television systems (commonly called CATV^{1/} systems) came into being to bring television to areas not reached by any television station and to afford multiple services to areas not already having them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal

^{1/} The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Section 74.1101(a), 2 F.C.C. 2d at 801.

and other changes in atmospheric conditions can impair or make impossible good television reception by ordinary means. Where such conditions prevail, master antennas have been erected at suitable locations, usually on a mountain or other high elevation where the reception of the signals of the desired stations is strong. The signals are then brought to the community by cable or radio hops and distributed by cable to the homes of individual customers within the community. At the home, the incoming cable is attached directly to the receiving connection of a regular television set.^{2/}

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,600. The distances over which signals are taken has also greatly increased, to as much as 600 miles. (See Second Report and Order of the Commission, adopting the current CATV regulations, pars. 116, 117, 2 F.C.C. 2d at 771-772.)

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained

^{2/} This Court is familiar with some of the regulatory problems created by the development of such systems. Philadelphia Television Broadcasting Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 359 F.2d 282 (1966); Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965); Citizens TV Protest Committee v. Federal Communications Commission, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965); Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359, cert. denied 375 U.S. 951 (1963).

only in the underserved communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities (Second Report and Order, Par. 117, 2 F.C.C. 2d at 771-772). Because of this growth, the Commission has been concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities, might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV can cause.

On April 23, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 1 F.C.C. 2d 453, proposing to assert jurisdiction over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up. Parties who urged the adoption of rules to govern CATV operation pointed to the explosive growth of CATV operations and contended that unregulated CATV growth, by fragmenting the available audience, would endanger both local television service and the development of a nation-wide "free" television service utilizing the UHF channels to provide multiple services in the major markets.^{3/}

^{3/} By Public Law No. 529, approved July 10, 1962, 76 Stat. 150, 47 U.S.C. Section 303(s), Congress, in the so-called all-channel receiver legislation, authorized the Commission to require all television receivers shipped in interstate commerce, or imported into the United States, to be capable of receiving UHF as well
(cont'd)

The Commission divided the proceeding into two parts. In Part I, the Commission announced its tentative conclusion that it has jurisdiction over all CATV systems, and it proposed to extend the substantive provisions of rules it had already adopted for microwave-served CATVs to all CATV systems^{4/} (1 F.C.C. 2d at 463-467).

In Part II (1 F.C.C. 2d at 467-477), the Commission initiated a rule making inquiry looking toward possible rule making on further questions posed by the present trends in CATV development including, inter alia, the effect upon independent UHF stations of "the mushrooming entry of CATV into major centers of population" (1 F.C.C. 2d at 468). The Commission stated that it needed further information on the probable impact of CATV in the larger population centers before reaching a decision (1 F.C.C. 2d at 470-471). It stated (1 F.C.C. 2d at 471):

Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments

^{3/} (cont'd) as VHF signals. The major purpose of this legislation was to promote the development of multiple television services nationwide through locally situated UHF outlets. See H. Rept. No. 1559, 87th Cong., 2d Sess. 2-6; S. Rept. No. 1526, 87th Cong., 2d Sess., 2-5.

^{4/} These rules contained requirements that a CATV system carry local television stations and not duplicate their programs within certain time limits. See 47 CFR Sections 21.712 and 91.559 (1966).

but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect. 5/

The Commission announced that in the meantime it would grant microwave radio applications to bring CATV into large market areas only on a showing that independent UHF operations would not be threatened (1 F.C.C. 2d at 471). And it specifically asked for comments on whether this kind of regulation should be extended to non-microwave CATV systems "through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community . . . [with four or more commercial assignments] without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community". (1 F.C.C. 2d at 472).

The Commission concluded (1 F.C.C. 2d at 476-477) by advising all parties that although a further notice would in all

5/ These proposals, described in the Notice, 1 F.C.C. 2d at 453-463, included an American Broadcasting Company request that the Commission "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission," 1 F.C.C. 2d at 457; and a Westinghouse Broadcasting Co. request that "CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station," 1 F.C.C. 2d at 460.

likelihood be issued, final rules might be adopted "without conducting new proceedings." It stated:

In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counterproposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission. (Emphasis added.)

The inquiry and proposed rulemaking are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing CATV systems are ultimately adopted. Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over

all CATV systems. Moreover, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time. (Emphasis added.)

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, et al., in which it adopted new final rules (2 F.C.C. 2d 725)^{5a/}. After a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission asserted jurisdiction over all CATVs, made final revised rules requiring the carriage of local television stations and non-duplication of their signals, and adopted a new rule to limit the impact of CATV operations in the major markets.

The Commission noted that Congress, in the 1962 all-channel receiver legislation (see footnote 3, supra), had made the judgment that the widest possible development of UHF is the best way of achieving an adequate national television service, including both commercial and educational systems (2 F.C.C. 2d at 770). It believed that since UHF development was already proceeding in at least 163 communities or areas - most of which were located within the top 100 television markets - any halt or curtailment of the growth of UHF development caused by the importation of

^{5a/} Several weeks before, on February 15, 1966, the Commission had released a public notice announcing generally the context of the rules (F.C.C. Mimeo. No. 79927). This notice made clear that systems such as Buckeye proposed would require prior Commission approval.

signals by CATV from other areas into these areas would be particularly significant. The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the original station into any Grade A service area of any station in a community in one of the top hundred markets.^{6/}

Section 74.1107 of the Rules was adopted to carry out this determination.^{7/} The rule provides in essence that, absent Commission approval, no CATV system operating within the 100 largest television markets can bring into the market the signals of outside television stations where the result is to extend the signals of such stations beyond their predicted Grade B contour. The rule prescribes procedures whereby Commission approval may be obtained. In addition, to avoid disruption of existing service, systems in operation as of February 15, 1966, the date on which public notice was given that new rules would soon be adopted, are allowed to continue their existing operations (2 F.C.C. 2d at 784-785).

^{6/} A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good signal is received for 90 per cent of the time at the best 70 per cent of locations. See Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, at 215-216 n. 12, 225 F.2d 511, at 515-516 n. 12 (1955).

^{7/} The text of the rule is set forth at pages 4-6 of the appendix to appellant's brief.

In April, 1966, Buckeye Cablevision, Inc. (hereinafter appellant or Buckeye), along with six other petitioners, requested the Commission to stay the effective date of its Second Report and Order and the Rules promulgated pursuant thereto until resolution of their concurrently filed petitions for reconsideration or until final adjudication of appeals from the Second Report or action by Congress, whichever should occur first. Buckeye additionally sought a stay of the cease and desist proceedings against it. By Memorandum Opinion and Order released simultaneously with the Commission's Decision here appealed from,^{8/} the petitions for stay were all denied (3 F.C.C. 2d 816).

II. The Cease and Desist Proceeding.

Buckeye Cablevision, Inc. is the owner and operator of a community antenna television system at Toledo, Ohio. The system makes available to its subscribers for a fee the signals it receives off-the-air from nine television stations as follows: Toledo stations WTOL-TV, WSPD-TV, and WGTE (an educational station); stations WKBD-TV, WJBK-TV, WWJ-TV and WXYZ-TV of Detroit, Michigan; WJIM-TV of Lansing, Michigan, and CKLW-TV of Windsor, Ontario.^{9/} The system also transmits weather and time reports (R. 1).

^{8/} The petitions for reconsideration of the Second Report and Order are still pending before the Commission.

^{9/} The following channels have been assigned to Toledo, Ohio: Channels 11, 13, 24, 30 (reserved for educational purposes), 54 and 60, 47 CFR 73.606. At the time the show cause order herein was issued, stations were operating on channels 11, 13 and 30. On May 3, 1966, subsequent to the hearing in this proceeding, WDHO-TV commenced operation on Channel 24 at Toledo.

On March 25, 1966, the Commission issued an order (R. 1-4), 3 F.C.C. 2d 81, directing Buckeye to show cause why a cease and desist order should not be issued against further operation of its CATV system in Toledo, Ohio, in violation of the CATV regulations. Specifically, the order charged Buckeye with extending the signals of stations WKBD-TV, Detroit (Channel 50) and WJIM-TV, Lansing, Michigan (Channel 6), beyond their Grade B contours, thus contravening section 74.1107 of the rules. The order further stated (R. 2-3, 3 F.C.C. 2d 82-83):

Clearly, time is of the essence here. This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening the rules. The public interest requires that insofar as possible the situation in Toledo should not be permitted to worsen. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably require that the examiner certify the record, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within 7 calendar days after the date the record is closed. We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rule. (Footnote omitted.)

Prehearing conferences were held on April 19 and April 25, 1966. At the latter conference, the Hearing Examiner, over Buckeye's objection, granted petitions to intervene filed by D. H. Overmyer, permittee of station WDHO-TV, and by Storer Broadcasting Company, licensee of station WSPD-TV, both in

Toledo, making them parties to the proceeding (Tr. 30, R. 139). The evidentiary hearing commenced on April 28, 1966, and the record was closed on that date. Pursuant to the mandate contained in the order to show cause, the Hearing Examiner certified the record to the Commission on April 29, 1966 (R. 142). On May 5, 1966, all parties filed proposed findings of fact and conclusions of law (R. 208, 270, 279 and 291) with Buckeye filing, in addition, a forty-seven page brief in support of its contentions (R. 221).

In a decision released May 27, 1966, 3 F.C.C. 2d 798, the Commission ^{10/} found that Buckeye owns and operates a community antenna television system as defined by section 74.1101(a) of the rules; that Buckeye's CATV system operates within the Grade A contours of the Toledo television broadcast stations; that Toledo is ranked as the 26th largest television market by the American Research Bureau (ARB); that the Buckeye CATV system commenced operation after February 15, 1966; that since March 16, 1966, it has distributed to its subscribers the signals of numerous television stations, including that of television station WJIM-TV at Lansing, Michigan, approximately 90 miles from Toledo, which signal it has extended beyond the latter station's Grade B contour without requesting and obtaining Commission approval. On the basis of the foregoing, the Commission concluded that Buckeye's

^{10/} One Commissioner dissented from the action; another was absent when it was taken.

CATV system was operating in violation of section 74.1107 of the rules and that the public interest required the issuance of an order pursuant to 47 U.S.C. Section 312(b) directing Buckeye to cease and desist promptly from such unlawful operation (3 F.C.C. 2d at 804-805).

The Commission further found, on the basis of the engineering showing made at the evidentiary hearing, that the predicted Grade B contour of television station WKBD, Detroit, just penetrates the city limits of Toledo in a narrow peninsula at the northern end of the city. Accordingly, the Commission noted, under the terms of Section 74.1103, requiring a CATV system to carry, within the limits of its channel capacity, all stations "within whose Grade B contours the system operates, in whole or in part" [emphasis added], carriage of WKBD is not only permissible but required upon request (3 F.C.C. 2d at 800).

In its decision, the Commission carefully considered but rejected contentions going to its jurisdiction, to the validity of the February 15, 1966, date specified in the grandfathering provisions of Section 74.1107(d), to the use of the ARB ratings, and to the validity of the expedited hearing procedure prescribed in the Commission's order to show cause (3 F.C.C. 2d at 801). Each of these arguments, with the exception of the jurisdictional matter, is made to this Court and will be discussed in detail in our Argument, infra. In regard to the question of the Commission's jurisdiction over CATV systems which obtain

signals directly off-the-air, appellant states in a "Preliminary Statement" (Br. (i) to (ii)) that it will neither argue nor brief the jurisdictional question since this issue is presently pending before the United States Court of Appeals for the Eighth Circuit.^{-11/}

The Commission additionally denied Buckeye's request for oral argument prior to decision on the ground that no useful purpose would be served since the basic facts were not in dispute and, with respect to the legal issues, extensive briefs had been submitted in both this proceeding and the rule making proceeding wherein the parties had fully set forth their legal arguments (3 F.C.C. 2d at 804). Various additional pleadings filed by Buckeye were likewise carefully considered but rejected.^{12/}

^{11/} Buckeye asserts that it may at a later date seek to raise the jurisdictional point in this proceeding. We believe, however, that notwithstanding this reservation, Buckeye's failure to brief the matter is tantamount to abandonment. Cf. Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965).

^{12/} On April 18, 1966, Buckeye had filed: a petition to clarify or enlarge the issues, endeavoring to enlarge the scope of the cease and desist proceeding (R. 17-38); a petition requesting the Commission to reconsider its order to show cause or, in the alternative, to consolidate for hearing with the show cause proceeding its previously filed petition seeking a declaratory ruling that its Toledo operations conform to all valid Federal regulations, or a waiver of any rules or regulations necessary for such operation and program distribution (R. 39-63); and a petition seeking a continuance of the hearing until May 31, 1966 (R. 64-66). This latter petition was denied on April 19, 1966 (R. 67). On this same day, Buckeye filed a petition seeking a stay of the effective date of the Commission's Second Report and Order and of its Cease and Desist proceedings (R. 68-79). On April 27, 1966, the Commission denied Buckeye's petition for reconsideration insofar as it sought a (cont'd)

Finally, the Commission denied a petition which had been filed by intervenor Overmyer seeking to enlarge the scope of this hearing to include consideration of its request for a prohibition against the carriage by Buckeye of the signals of certain stations even though such stations provide Toledo with a predicted Grade B signal. The Commission stated that compliance with the rules by Buckeye was the critical issue in the proceeding, that the public interest required resolution of this matter as expeditiously as possible, and that, therefore, Overmyer's petition would be considered in a separate action and disposed of by a separate order (3 F.C.C. 2d at 805).

In sum, the Commission stated (3 F.C.C. 2d at 805):

" . . . we believe that the issue in this case, while narrow, is of great importance, since it involves the validity of our major market, distant signal policy embodied in section 74.1107. Buckeye, in carrying the signal of Lansing station WJIM-TV beyond its Grade B contour into Toledo, without having made the showing referred to in section 74.1107 and obtained the requisite Commission approval, is operating in clear violation of that section. The issue presented is thus whether CATV systems such as Buckeye may bring in such distant signals -- today from Lansing, tomorrow from Cleveland, Chicago, or other major cities -- without regard to the provisions of our regulations. To condone such activity by CATV systems would wholly frustrate orderly consideration of the very important public interest questions presented in this vital field."

12/ (cont'd) continuance of the hearing or consolidation with a hearing on the matter of a waiver (R. 91-92). The balance of the above pleadings, including the request for a waiver, were also denied. We note that in footnote 45 at p. 32 of appellant's brief, appellant contends that its April 18, 1966, Petition to Clarify or Enlarge Issues "has never been acted upon." We respectfully point out that paragraph 21 of the Commission's cease and desist order, 3 F.C.C. 2d at 806, specifically denies such petition.

SUMMARY OF ARGUMENT

I.

The Commission's CATV rules are reasonable restrictions in the public interest on the use by CATV systems of radio signals. They do not violate the protection of free speech contained in the First Amendment to the Constitution. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). They do not limit or affect a CATV system's origination and distribution of its own programs.

II.

The Commission's Notice of Inquiry and Notice of Proposed Rule Making adequately described the subjects and issues involved and otherwise complied with the notice requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. Section 1003. The rules as adopted came well within the subject matter and issues discussed in these Notices, namely, how to deal with the growth of CATV in large markets and how to maintain the status quo until the broader policy decisions could be reached. Adequate notice was given that final rules might be adopted without further proceedings, and interested parties were afforded every opportunity to, and did participate in the rule making proceeding. The Commission's decision not to hold an evidentiary or oral hearing was a matter well within its discretion. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S.

134 (1940); Federal Communications Commission v. WJR, 337 U.S. 265 (1949). No abuse of this discretion has been shown. Federal Communications Commission v. Taft B. Schreiber, 381 U.S. 279 (1965).

III.

Section 74.1107 has no retroactive effect. The fact that the rule "grandfathers" operations commenced before February 15, 1966, has no bearing on the question of retroactivity. The rule became effective as of its date of publication, March 17, 1966, and only those systems which operate in violation of its terms after that date are subject to sanctions. Section 74.1107 does not purport to make illegal any CATV operation engaged in prior to that date. The Commission's determination to make this rule effective upon its publication, rather than 30 days thereafter, was a valid exercise of its discretion in light of the rapid expansion of CATV systems, the desirability of prompt action to minimize disruption of service, and considerations of administrative efficiency.

IV.

The Commission's decision to obtain compliance with the CATV rules before considering requests for waiver is reasonable and clearly within the scope of its discretion. Its judgment in this regard was dictated by requirements of orderly procedure, fairness to those systems which comply with the rules, and out of consideration for potential subscribers whose service would be

substantially disrupted if it was ultimately found that the importation of distant signals was contrary to the public interest. It is noted that in this particular case, since this policy had not previously been enunciated, the Commission did separately consider the question of whether a waiver of the requirement for an evidentiary hearing should be granted. After careful consideration, however, it determined that the public interest required compliance with the rule.

V.

Expedited hearings are specifically authorized by Section 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 409(a), where due and timely execution of the Commission's functions imperatively and unavoidably requires such action. The Commission's determination to hold an expedited hearing in this proceeding was based upon its judgment that this procedure was necessary to accomplish its objection of preventing a cable system carrying distant signals from becoming entrenched before the Commission could take effective action. Within the procedural framework prescribed by statute, the Commission has broad discretion to fashion the course of its own proceedings. Appellant has shown no violation of law and no abuse of discretion on the part of the Commission.

ARGUMENT

I. The CATV Rules Are Reasonable Restrictions In The Public Interest And Do Not Violate The First Amendment To The Constitution.

The Federal Communications Commission has imposed upon CATV systems the degree of regulation it deemed necessary to insure that CATV service will be of maximum benefit in distributing television signals to the American public without undermining the existing system of television broadcasting. The rules relate only to the use made of television broadcast signals, and they limit that use only for the purpose of maintaining both local "free" television service and CATV service as coordinated components of a nationwide television service. The rules do not limit or affect a CATV system's origination and distribution of its own programs; they do not license CATV systems as television stations are licensed; they do not regulate the fees charged.

Buckeye does not challenge the basic authority of the Commission to adopt rules regulating CATV systems in the public interest.^{13/} For purposes of this appeal, therefore, such authority must be assumed. Buckeye contends, however, that certain of the CATV rules, particularly Section 74.1107, restrict freedom of speech

^{13/} In its Notice of Inquiry and Notice of Proposed Rule Making, the Commission sought comments concerning the question of its jurisdiction to regulate all CATV systems. 1 F.C.C. 2d at 464-465. As Appendix B to this Notice, it included a Memorandum dealing very comprehensively with this jurisdictional question and setting forth at length its reasons for asserting jurisdiction over all CATV systems, whether or not served by microwave. 1 F.C.C. 2d at 478-482. In its Second Report and Order, the Commission reviewed those comments which had been filed in opposition to its assertion of jurisdiction over all CATVs (2 F.C.C. 2d at 728-734), concluding that such arguments "do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention" (Ibid. at 733). Accordingly, the Commission concluded, for the reasons it had previously set forth, that it has authority under the present provisions of the Communications Act to regulate all CATV operations, whether or not microwave facilities are used.

in violation of the First Amendment.^{14/} While we agree with much of what appellant says with respect to the general application of the First Amendment, we believe that the particular claim made here has been essentially foreclosed by the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

In the National Broadcasting Co. case, the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment. That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with

^{14/} Buckeye appears (Br. 13) to question not only that part of the rules governing the importation of distant signals into Toledo (Section 74.1107) but also the carriage and non-duplication requirements, which govern the CATV system's relationship with local television stations (Section 74.1103). However, those requirements are not involved in the order under review. If Buckeye believes those aspects of the rule also to be in violation of the First Amendment, it may challenge them in an appeal from the rule making. In any event, similar carriage and non-duplication requirements have already been adjudged not to be in conflict with the First Amendment. Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), cert. denied 375 U.S. 951; Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965).

comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" (319 U.S. at 217). The Court concluded that (319 U.S. at 227):

* * * The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Assuming that the Commission has been granted the authority by Congress to limit the extension of television broadcast signals into new areas by CATV, -- and, as noted above, Buckeye has not challenged the Commission's assertion of jurisdiction -- the National Broadcasting Co. case makes clear that such a limitation raises no substantial free speech question. For the regulation at issue here is merely another aspect of regulation of use of the air waves. CATV systems constitute a part of the scheme of television distribution which, unlike any other mode of expression, make use of radio signals as a sine qua non of their operation.^{15/}

^{15/} In 1955, when CATV was in an initial stage of development, this Court stated: "The Commission will presumably assert jurisdiction to regulate community antenna systems if and when it concludes that such systems provide or are adjuncts of a broadcast service. Its failure thus far to assert such jurisdiction, standing by itself, (cont'd)

The Commission has found (2 F.C.C. 2d at 771), that "Congress and the American public have staked a great deal on the development of UHF," and that there has been a strong indication in recent years of a trend favorable to UHF. Even more rapid, however, has been the growth of CATV. "The most critical question posed," the Commission stated, "is how these two trends mesh in the ensuing years" (2 F.C.C. 2d at 772). The purpose of Section 74.1107 is to assure that these developments progress in an orderly manner. It does so by providing a regulatory framework wherein the growth of CATV in the major markets of the country will not be indiscriminate and uncontrolled, but will be measured against the paramount public interest.

Buckeye contends that Section 74.1107 is unreasonable because (1) there is no basis for the Commission's fears that the effect of CATV on UHF development will be harmful, and (2) the

15/ (cont'd) cannot support a conclusion that the systems are not service within the meaning of the rule. It is unrealistic to overlook the fact that, through the community systems, Clarksburg residents are receiving and are, in a sense, being served by the programs of the Wheeling station. * * * (Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955).)"

rule fails to take into account the benefits in terms of the competitive stimulation that CATV can provide. But the Commission has not finally resolved either of these matters with respect to Buckeye's Toledo system. What the Commission has done -- and what Buckeye refuses to do -- is to recognize that a substantial problem exists which requires further examination. Buckeye's assertions are at this point simply bare allegations. If they are borne out in a hearing, permission may well be granted to import the signals of the Lansing station. In the meantime, of course, Buckeye is free to serve its customers with the other signals permitted by the rules.

The imposition imposed on Buckeye is a narrow one and may be only temporary in its effect. As such, it is no more restrictive than requirements which the Commission has in the past imposed on applicants for microwave licenses who proposed to serve CATV systems. In upholding such regulations against claims that First Amendment freedoms were violated thereby, this Court stated that "protection of the public interest does not amount to 'censorship,'" Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. at 98, 321 F.2d at 364. See also Idaho Microwave, Inc. v. Federal Communications Commission, supra.

It is important to point out that the Commission's rules contain no restrictions of any sort on appellant's right to

originate its own programs. No expression by appellant is involved. Appellant is restricted only in the use it makes of signals broadcast by others. Weaver v. Jordan, 49 Cal. Rep. 537, 411 P.2d 289 (1966), cert. den. 35 U.S. L. Week 3126 (Brief 16), is therefore not in point. In that case, the Supreme Court of California struck down, as inconsistent with the First Amendment, an absolute prohibition against the origination of programs by a wire Pay-TV system, and the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That decision, in our view, was carefully drafted so as not to prohibit the kind of limited regulation embodied in the Commission's CATV rules.

All that is involved in the rule at issue here is a requirement that the public interest be ascertained before the programs of a television station are extended beyond the area that would ordinarily receive its signals off the air. Clearly such a rule raises no substantial question of free speech under the First Amendment. Instead, being reasonably related to valid public interest objectives, the rule represents a proper exercise of authority pursuant to the Communications Act.

II. The Commission's Notice Of Inquiry And Notice Of Proposed Rule Making Adequately Described The Subjects And Issues Involved And Otherwise Complied With The Requirements Of Section 4 Of The Administrative Procedure Act.

Appellant contends that the Notice of Inquiry given by the Commission in advance of the adoption of its new CATV Rules, particularly Section 74.1107, failed to meet the minimum notice requirements guaranteed by Sections 4(a) and (b) of the Administrative Procedure Act, 5 U.S.C. Section 1003 (Br. 16-17). It contends also that the Commission erroneously refused to order an oral hearing before adopting the rules. We believe it is clear that the rule making Notice apprised interested parties of "the subjects and issues involved" as required by the Administrative Procedure Act and that otherwise the procedure followed fully complied with statutory requirements.

A. The Notice Of Rule Making Gave Adequate Notice That Final Rules Might Be Adopted Without Further Proceedings.

There is no merit to appellant's contention that the rule making Notice was fatally defective because it misled the public into believing that only interim rules were under consideration and that a further notice and opportunity to comment would precede the adoption of final rules (Br. 18-20). While it is true that comments on interim action were requested in paragraph 50 of the Notice (1 F.C.C. 2d at 471-472), and that the Commission stated it would "in all likelihood" issue a further Notice of

rule making (paragraph 64, 1 F.C.C. 2d at 476), the Commission nevertheless made clear that it reserved the right "to take any rule making action found appropriate at the conclusion of this proceeding, without conducting new proceedings" (1 F.C.C. 2d at 476). Paragraphs 64 and 65 of the Notice, quoted in full at pages 7-8 of our Counterstatement, are, we submit, dispositive of this question. There the Commission gave notice that it would receive and consider comments on all facets of the CATV problem so that a further rule making proceeding, although contemplated at the time, would not be a prerequisite to the adoption of permanent rules.

Among the topics expressly mentioned in the Notice was the problem of "proposed large-scale CATV operations in major cities with burgeoning UHF independent development," 1 F.C.C. 2d at 472. This, of course, is the problem dealt with in Section 74.1107. In addition, the Notice made clear, contrary to Buckeye's assertion, that regulation of non-microwave systems was contemplated. This, as the Commission stated, was "to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate, as requested by one of petitioners, to put all persons who now

operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (1 F.C.C. 2d at 477).

Thus, there is no basis for Buckeye's complaint that the Notice guaranteed an additional opportunity to comment before permanent rules were adopted. But aside from this, it is clear that under the express terms of Section 74.1107, Buckeye is presented with an additional opportunity to submit its views. For what the Commission has done, in effect, is to substitute case to case adjudication for the further rule making originally contemplated. Thus Section 74.1107, while "final" rather than "interim," does not purport to resolve permanently the questions posed by Buckeye's system. Rather it provides that these will be settled in a hearing where Buckeye will have a full opportunity to persuade the Commission that the importation of distant signals into Toledo will be consistent with the maintenance of healthy television broadcast service in the area.

B. The Notice Of Proposed Rule Making Provided Sufficient Notice Of The Substance Of The CATV Rules.

Appellant argues that the Commission's new CATV rules, particularly Section 74.1107, were illegally adopted because the notice requirements of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. Section 1003(a), were allegedly not complied with. Appellant cites as examples the fact that the

Notice of Inquiry contained no indication that "grandfather" rights would be established with respect to the importation of distant signals, that a standard based on the top 100 American Research Bureau markets would be employed, or that the signal from a UHF station available off-the-air in a community beyond its predicted Grade B contour would be a prohibited "distant signal" (Br. 20-21).

It should be noted at the outset that Section 4(a) provides simply that notice be given as to "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Thus, the agency need not publish in advance the precise rule finally adopted, or all of the possibilities for resolving the issues. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 684 (C.A. 9, 1949), cert. denied 338 U.S. 860; Wilson & Co. v. United States, 335 F.2d 788 (C.A. 7, 1964), cert. denied 380 U.S. 951; Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). And, in its final action, it may properly take account of further proposals submitted to it in the course of the proceeding. Owensboro on the Air, Inc. v. United States, 104 U.S. App. D.C. 391, 262 F.2d 702 (1959), cert. denied 360 U.S. 911. As appellant recognizes (Br. 17), what is required is that the notice of rule making "fairly apprise interested persons of the issues involved, so that they may present relevant data or argument." H. Rept.

No. 1980, 79th Cong., 2d Sess., p. 24; S. Rept. No. 752, 79th Cong., 1st Sess., p. 14. The Commission's proceeding fully met this standard.

The Notice of Inquiry and Notice of Proposed Rule Making gave full notice to all interested persons of the subject matter and issues involved. The essential problem was the potentially harmful effect upon "free" local television, and particularly the effect upon independent (non-network) UHF stations, of "the mushrooming entry of CATV into major centers of population" (par. 39, 1 F.C.C. 2d at 468). The Commission extensively discussed the issues involved in CATV operation "in areas with potential for independent stations," pointing out that "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities" (pars. 48-50, 1 F.C.C. 2d at 471-472).

The Commission requested comments not only on the general problem, but also on the specific proposals of certain petitioners, which proposals were set forth in the Notice. These proposals included a request that the Commission "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations'

signals to serve other areas except upon prior consent of the Commission" (par. 10, 1 F.C.C. 2d at 457); a request to "stay immediately the commencement of operations by CATVs in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect" for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas" (par. 22, 1 F.C.C. 2d at 462); and a request that the Commission "put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations" (par. 24, 1 F.C.C. 2d at 463). The questions of "effective date" and "grandfathering" were implicit components of the course of action proposed by the Notice, and many comments advocating a number of different positions were received and considered (3 F.C.C. 2d at 819-823).

In sum, the Notice was in complete compliance with the notice requirements of the Administrative Procedure Act. The issues propounded in the Notice were how to deal with the growth of CATV in the large markets, and how to maintain the status quo until the broader policy decisions could be reached. These

were the same issues resolved in the rules. Appellant and other interested parties had adequate opportunity to address themselves to these questions. This being the case, there is no basis for the contention that the notice requirements of the Administrative Procedure Act were not complied with.

C. Interested Parties Were Afforded An Opportunity To Participate In The Rule Making Proceeding.

Appellant contends (Br. 22) that an inherent defect in the rule making proceeding which culminated in the adoption of the Second Report and Order was the Commission's failure to afford appellant and others the full hearing contemplated by Section 4(b) of the Administrative Procedure Act. This argument, we submit, is contrary both to applicable statutory and judicial authority.

Section 4(b) provides in regard to rule making proceedings that, after notice, an agency shall afford interested persons an opportunity to participate in the rule making proceeding through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. Here, notice was given and interested parties were afforded every opportunity to, and did participate in the rule making proceedings. Appellant apparently concedes that Section 4(b) does not compel a full evidentiary or oral hearing in every case of administrative rule making, but argues that since the regulation of CATVs is a matter of extreme importance, such a hearing should have been held in this instance.

It is well-settled, however, that the Commission has wide discretion in controlling the course of its own proceedings. Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(j), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This provision has been construed as granting to the agency broad authority in adopting procedures appropriate to the task at hand. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Communications Commission v. WJR, 337 U.S. 265. No abuse of this discretion has been shown, Federal Communications Commission v. Taft B. Schreiber, 381 U.S. 279 (1965).

Appellant cites (Br. 22-23) numerous instances in the Commission's history where evidentiary hearings and/or oral arguments en banc have been held in connection with rule making proceedings. However, the mere fact that oral hearings have been held in the past in other situations does not make such hearings mandatory since the Commission is not bound "to deal with all cases at all times as it has dealt with some that seem comparable." Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228 (1946).^{16/}

^{16/} It is clear, moreover, that such hearings have been exceptional rather than the Commission's usual practice. The following are examples of rule making proceedings where no hearings were held:
(cont'd)

It is noteworthy, moreover, that Section 74.1107 does not purport to resolve the importation of distant signals question. On the contrary, it contemplates that "a full evidentiary hearing" will be held to permit the exploration of factors showing that the proposed extension of the distant signal would be consistent with the public interest in the establishment and healthy maintenance of television broadcast service in the area. The new CATV regulations simply seek to maintain the status quo pending resolution of the public interest at a later date. The rule, by its terms, affords appellant a full evidentiary hearing before the matter is finally resolved.

Thus, to the extent that factual disputes may be involved or that close questions of policy may make closer examination desirable, the rule expressly provides for such consideration. Under these circumstances, appellant's claim that the Commission engaged in improper procedural short-cuts in connection with the adoption of the CATV rules is particularly lacking in merit.

16/ (cont'd) Revision of UHF Table and Methods to Facilitate Fuller Utilization of UHF Channels, Docket No. 14229; Inquiry into CATV, Docket Nos. 12443, 14895, 15586, 15415; Rules Adopting New Technical Rules and Establishing Nationwide Table of FM Channel Assignments, Docket No. 14185; Amendment of Sponsorship Identification Rules (Payola and Plugola), Docket No. 14094; Establishment of Instructional Television Fixed Service for Educational Television In-School Use, Docket No. 14744; Amendment of Multiple Ownership Rules, Docket No. 14711; Amendment of Rules to Eliminate Objectionable Loudness of Commercial Announcements, Docket No. 14904; Amendment to Regulate Fraudulent Billing Practices, Docket No. 15396.

III. Section 74.1107, The Commission's New Distant Signal Rule, Has No Retroactive Effect; The Fact That The Rule "Grandfathers" Operations Commenced Before February 15, 1966, Has No Bearing On The Question Of Retroactivity.

Section 74.1107(d) specifies that the provisions of the rule "shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date." This technique of exemption or "grandfathering" of operations in existence at a specified date is a familiar one. In United States v. Maher, 307 U.S. 148 (1939), the Supreme Court referred to a typical "grandfather" clause, section 206 of the Motor Carrier Act of 1935, 49 U.S.C. 306 and stated: "By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established." 307 U.S. 153.

Similar considerations influenced the Commission, after careful consideration, to extend an exemption to signals being supplied by CATV systems on or before February 15, 1966 (3 F.C.C. 2d at 819-823). Many of those filing comments in the rule making proceeding had urged that no "grandfather" clause be adopted at all; others had suggested April 23, 1965, the date the notice of rule making was issued, as the cut-off

date. In resolving this matter, the Commission stated (Id. at 820):

The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated. Some appropriate form of grandfathering was therefore in order. Here again we might have chosen a date such as January 1, 1966, on the ground that there might not be too much disruption since systems which commenced operation after that date would not ordinarily have a great number of subscribers. Instead, we determined to take an approach even more liberal to the CATV industry, and adopted the February 15 grandfather date -- the date on which the Commission reached informal agreement on its general policy in this area. There was widespread interest in our discussion, both in Congress and in the industries involved, and we therefore publicly announced the overall course we had determined upon.

The Commission then turned to the contention now being made by appellant that, at the earliest, March 17, 1966, the date the new CATV Rules became effective, should be determinative as to the "grandfathering" question. It found "sound reasons militating against such a course." Stating that CATV growth has been "explosive," a finding amply documented from a nationwide standpoint, the Commission found that "even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree." Its opinion continues (Id. at 821-822):

Of particular concern in our decision to adopt the February 15 grandfathering date is the tendency of some business entrepreneurs to make extraordinary efforts to commence operations before an announced deferred deadline

which will confer grandfather rights. If the effective date of section 74.1107 had been postponed until 30 days after publication and the grandfathering line had been drawn either at that point or at the publication date, it is likely that many of the 1,207 franchised systems not yet in operation would have made extraordinary efforts to commence service to a token number of subscribers before the deadline, in order to be in a possible position to expand throughout the entire community without undergoing the hearing which we have found required by the public interest. It is reported, for example, in the April 4, 1966, edition of Cable Television Review (p. 3) that in Toledo, petitioner Buckeye, who is challenging the validity of the February 15 grandfathering date, "raced the clock prior to the March 16 FCC report and order deadline, and was delivering signals to 52 homes 8 hours before the 17th" (opposition of Storer Broadcasting Co. to petition for stay, p. 3).

* * *

In short, we simply do not believe that in a situation of rapid change we are precluded from taking immediate action to stay, pending hearing, the commencement of new operations which could be seriously detrimental to the public interest and which by the act of coming into being might preclude effective remedial action by the Commission -- at least without substantial disruption to the public. Sound public interest considerations therefore existed for drawing the grandfathering line at February 15. We stress again that selection of this date was less stringent action than an earlier cutoff, and was designed to minimize any disruption in existing service to the CATV segment of the viewing public, while at the same time affording necessary protection against possible irreparable injury to the public interest from a pell-mell scramble for commencement of new operations in major markets during a hiatus.

In light of the foregoing, we believe that ample justification was shown for the selection of the February 15 cut-off point. Contrary to appellant's assertion, the Commission expressly took into account the number of existing systems and also considered data with respect to the number that might be expected to commence operation in the immediate future (3 F.C.C. 2d at 821). It concluded that even a matter of several weeks in assigning a date governing exemption from the rules "might have irrevocably changed the existing situation."

Appellant's attempt to stigmatize the exemptive provision of Section 74.1107 by terming it "retroactive" is plainly without merit. The rule itself became effective as of March 17, 1966, and only those systems which operate in violation of its terms after that date are subject to sanctions. It does not purport to make illegal any CATV operation engaged in prior to that date. Hence no retroactivity is involved.^{17/} The fact that the Commission selected a cut-off date for exemptions that preceded the effective date of the rules in no way alters this fact. The significance of the February 15 date is that it determines those systems to which the rule will apply; but conduct in violation

^{17/} While Section 74.1107 is not a retroactive rule it should be noted that nothing in the Administrative Procedure Act precludes the issuance of retroactive rules when otherwise legal and accompanied by a finding of good cause. And see S.E.C. v. Chenery Corp. 332 U.S. 194, 203 (1947).

of the rule is only that which occurs subsequent to the March 17, 1966 effective date.

And, finally, there is no merit to the contention that good cause did not exist for making the rules effective as of the date of publication rather than thirty days thereafter. By its terms, Section 4(c) of the Administrative Procedure Act establishes a discretionary exception to the general rule that publication must be made at least thirty days prior to the effective date. The same considerations which prompted the Commission to establish the February 15 grandfather date militated in favor of an immediate effective date. In addition, the agency found that "orderly procedure and the desirability of avoiding disruption . . . called for prompt Commission action against any system commencing operation after that date in violation of the rules, rather than the Commission waiting passively on the sidelines for the 30-day period to expire" (3 F.C.C. 2d at 823). Buckeye has failed to show that reliance on these considerations constituted an abuse of discretion. On the contrary, it is clear that the rapid expansion of CATV systems, the desirability of prompt action to minimize disruption of service, and considerations of administrative efficiency clearly justified the Commission in making the rule effective immediately.^{18/}

^{18/} In this connection it should be noted that Buckeye was in no real sense prejudiced by the Commission's action. For if the February 15 grandfather provision is valid, it makes no difference to Buckeye whether the rules became effective on March 17, 1966 or thirty days thereafter. Since Buckeye commenced operation after February 15, 1966, it is subject to the rule. And there is no dispute concerning the fact that Buckeye was in violation until issuance of the cease and desist order on May 27, 1966.

IV. The Commission's Decision To Obtain Compliance With The CATV Rules Before Hearing Evidence On Whether Service Should Be Permitted Constitutes a Reasonable Exercise Of Discretion.

Appellant argues that the cease and desist order is invalid since the hearing upon which it is based was restricted to the issue of compliance with the rule, the Commission refusing to hear evidence as to public interest considerations that might militate against issuance of an order even though a violation of the rule was established. It is clear from the Commission's decision, however, that the consideration of such evidence has not been barred but has instead been deferred until the hearing called for by Section 74.1107.^{19/} In the meantime, the Commission found, strong public interest considerations required immediate compliance. Its decision stated (3 F.C.C. 2d at 804):

" . . . we have no intention of permitting Buckeye to prolong this adjudicatory proceeding by broadening the scope of the hearing to include consideration of a request for waiver while the CATV system continues to be operated in violation of our rules. Once compliance has been achieved, we would generally then proceed to consider the contentions advanced to justify the waiver sought, together with the arguments in opposition to this request. However, until we can get to final disposition of the merits of the public

^{19/} The Commission did, however, give careful attention to Buckeye's request for special relief, contrary to the claim Buckeye now makes (Br. 33). Thus, the efforts it had made to commence operations, its financial commitments, and the harm that might result from delay were considered at length by the Commission. It found, for reasons discussed below, that these considerations were outweighed by others and that the public interest required compliance with the rule. 3 F.C.C. at 810-813.

interest question involved, it is imperative that Buckeye, and others similarly situated, comply fully with our rules so that the public will not be led to rely on a service which we may ultimately find not to be in the public interest."

In this respect, the Commission made reference to the Memorandum Opinion and Order it had released simultaneously with its cease and desist order, denying Buckeye's petition seeking a declaratory ruling that its Toledo operations conform to all valid Federal Regulations, or, in the alternative, seeking a waiver of any rules or regulations necessary for such operation (3 F.C.C. 2d 808). There, the Commission stated (Id. at 810-811):

"We think that the request for waiver must be denied. In the first place, we would not grant a waiver of Section 74.1107 while a system was operating in violation of that section. Ordinarily, we would not even consider the merits of a request for waiver until the violation had ceased. To condone such a procedure would undercut the very premise of Section 74.1107, that the public interest requires Commission consideration of new distant signal operations in major markets before they are commenced, and would encourage other persons to violate the rule while seeking relief before the Commission. Moreover, it would be manifestly unfair to persons who have sought a waiver or evidentiary hearing while deferring distant signal operations in compliance with the rule. Further, there would be an unfair delay in processing such petitions for waiver by those in compliance with the rule. Accordingly, we shall follow a course of promptly considering petitions for waiver by persons who are deferring distant signal operations in compliance with the rule, and of not considering requests for waiver by persons operating in violation of Section 74.1107 until the violation has ceased. Upon such cessation, the request for waiver will be placed on the processing line."

Nonetheless since this was the first case in which a request for waiver of the hearing requirement was presented, the Commission considered on the merits various arguments asserted by Buckeye and determined that they were offset by the above considerations, 3 F.C.C. at 810-813.

It is well settled that the Commission has wide discretion to control the scope of its proceedings and to establish the priorities as to the manner in which its business will be conducted. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Communications Commission v. Taft Schreiber, 381 U.S. 279 (1965). Here the Commission has made a policy judgment, applicable not only to Buckeye but to all other systems similarly situated, that compliance with the rules must be obtained before requests for relief are considered. The considerations underlying this judgment are manifestly reasonable. As set forth in the passages quoted above, the Commission found that such a course was dictated by requirements of orderly procedure, fairness to those systems which comply with the rules, and out of consideration for potential subscribers whose service would be substantially disrupted if it was ultimately found that the importation of distant signals was contrary to the public interest. Clearly, the Commission's judgment involves no abuse of discretion.

It is clear, also, that the considerations Buckeye wished to assert (Br. 33) are substantially similar to those

considered in the rule making proceeding and in Buckeye's request for a waiver, which, as already noted, supra, was dealt with on its merits. Having found that it was not in the public interest to permit the carriage of distant signals by cable systems operating in one of the top 100 television markets prior to the resolution of the questions presented by such operation in an evidentiary hearing, the Commission was plainly not bound to reconsider its finding in a cease and desist proceeding where similar evidence would be presented "although addressed now to a specific . . . application rather than to the general problem." National Broadcasting Co., Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 362 F.2d 946, 954 (1966).

In this regard, Buckeye's reliance on this Court's recent action in the Booth American case^{20/} and on C. J. Community Services, Inc. v. Federal Communications Commission, 100 U.S. App. D.C. 379, 246 F.2d 660 (1956) is clearly misplaced. A stay was granted in Booth American on the basis of unique circumstances not present here, but the Court's order made clear (p. 5) that questions regarding the scope of the Commission hearing were not being decided. Subsequently, in another case which raised virtually identical arguments to those being advanced here by Buckeye, the Court^{21/} denied a request for stay.

^{20/} Booth American Company v. Federal Communications Commission, No. 20367, Order p. 5 (September 16, 1966).

^{21/} Jackson TV Cable Co. v. Federal Communications Commission, Case No. 20,468 (October 13, 1966.)

In C. J. Community, a non-profit corporation installed a "booster" facility to bring television service to the small mountain town of Bridgeport in the State of Washington. The town was so situated that no usable television signal, coming directly from any licensed television station, was available to the town's inhabitants. Thus, the booster provided a first service to the community of Bridgeport and an important means of receiving news and information, entertainment and education (100 U.S. App. D.C. at 380, 246 F.2d at 661).

Acting pursuant to Section 312 of the Communications Act, 47 U.S.C. Section 312, the Commission ordered the appellant to cease and desist from the booster operation because the appellant was operating without a license. However, the Commission's rules then outstanding did not provide for the licensed operation of such installations. While a rule making proceeding had been instituted to examine the problem, it was still pending at the time of the Commission's order. Thus, the Commission argued that the only alternative to a licensed operation (which was not then possible under the rules) was "'not unlicensed operation, but no operation'" (100 U.S. App. D.C. at 382, 246 F.2d at 663).

Noting that it was "concerned only with the problem before [it]" (100 U.S. App. D.C. at 382, 246 F.2d at 663), this Court reversed the Commission. It ruled that the Commission was not compelled to issue a cease and desist order for every violation

of the Communications Act. The language of Section 312 states that a cease and desist order "shall" be issued only if it be decided that the order "should issue" (100 U.S. App. D.C. at 383, 246 F.2d at 664). Accordingly, this Court held (100 U.S. App. D.C. at 383, 246 F.2d at 660):

We will not determine that the agency rule-making action has been unreasonably delayed or that its instant action was arbitrary. We say only that, short of the appellant's statutory right, the Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order, and upon this point the Commission's order must be reversed.

In remanding the case to the Commission so that it might exercise its discretion to determine whether the circumstances warranted the issuance of a cease and desist order, this Court also observed, "that the Commission itself may conclude that it is manifestly inequitable that the appellant be subject to a cease and desist order when the Commission has failed to provide an administrative mechanism through which a license may be procured" (100 U.S. App. D.C. 383, 246 F.2d at 664). Thus, this Court suggested that the Commission consider a request by appellant for temporary authorization pending completion of the rule making proceeding (100 U.S. App. D.C. at 383-384, 246 F.2d at 664-665).

The situation here is totally dissimilar. The Commission has established rules to provide for the operation of CATV facilities. These rules constitute a comprehensive exercise of discretion

governing entry into the field and certain requirements as to mode of operation.

In addition, the Commission has separately considered the question of whether a waiver of the rule should be granted, and has given reasonable grounds for refusing to do so. Unlike C. J. Community, its decision to order appellant to cease and desist was not based upon any belief that it lacked discretion to permit continued operation in violation of the rule, but rather upon its view that the public interest would be adversely affected by permitting the status quo to be changed before a hearing could be held to determine the impact of CATV in the area. This determination, we submit, was reasonable and clearly within the scope of the Commission's discretion.

V. The Commission's Determination to Hold an Expedited Hearing In this Proceeding Was a Reasonable Exercise Of Its Discretion.

Appellant argues that the expedited hearing procedure adopted by the Commission robbed it of its right to a full hearing (Br. 35). This matter was raised before the Commission and rejected by it. The Commission properly pointed out that expedited hearings are specifically authorized by Section 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 409(a), and cited as supporting authority RCA Communications, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 163, 238 F.2d 24 (1956), cert. denied 352 U.S. 1004 (1957), and American Colonial Broadcasting Corp., 1 F.C.C. 2d 1464 (1965).

Appellant contends that Section 409(a) and the aforementioned cases lend no validity to the Commission's actions, arguing that the need for expedition must be determined on the record of the actual proceedings. We submit that the Commission properly based its finding as to need for an expedited proceeding on the information in its possession when it issued its show cause order plus the information it had obtained in its rule making proceeding resulting in the Second Report and Order. The Commission "does not have to remain oblivious to all that has gone before or ignore its own earlier actions and the evidence which justified those actions." National Broadcasting Co., Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, 362 F.2d 946, 955 (1966);

Transcontinent Television Corp. v. Federal Communications Commission,
113 U.S. App. D.C. 384, 308 F.2d 339 (1962).

In its decision, the Commission pointed out that Buckeye had been accorded the full thirty-day period provided by Section 312(c) of the Act within which to prepare for hearing, and that the record was not closed until Buckeye had indicated that it intended to introduce no evidence on the one issue before the Examiner, namely, compliance with Section 74.1107. The Commission then stated that only if no adequate basis existed for its finding of need for expedition may Buckeye prevail on its claim that an initial decision by the Examiner and an opportunity to file exceptions to such initial decision are essential. In this connection, the Commission noted the policy declarations it had made in its Second Report and Order concerning the entry of CATV into the major markets. That Report stated (2 F.C.C. 2d at 781):

" . . . And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services and four independent UHF stations either on the air or authorized), CATV may we recognize, increase viewing opportunities, either by bringing in programming not otherwise available or, what is more likely, bringing in programming locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or

maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

"Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303(h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest."

It was in the light of the foregoing policy considerations that the Commission considered the need for expeditious adjudication in this proceeding. At the time the show cause order in regard to appellant's operation was adopted, the information before the Commission indicated that appellant had commenced operation of a CATV system in one of the top 100 television markets after February 15, 1966, and was extending the signals of certain stations beyond their Grade B contours by transmitting such signals

to its subscribers without first requesting or obtaining Commission permission. Appellant gave no indication that it would voluntarily cease the proscribed operation until Commission consent was obtained. On the contrary, it appeared that Buckeye intended to expand service into additional sections of the Toledo metropolitan area as soon as the wiring and other preliminary work in such areas could be completed. The Commission properly concluded that it could not permit this case to go through the regular hearing process of initial decision and exceptions prior to Commission review and accomplish its objective of preventing cable systems carrying distant signals from becoming entrenched before taking effective action. Under the circumstances, the Commission found that "due and timely execution" of its functions "imperatively and unavoidably required" the expedited proceeding (3 F.C.C. 2d at 803). This finding, together with the reasons underlying it, were recited on the record. We submit that this determination was a reasonable exercise of discretion by the Commission, and that it complied fully with the statutory requirement.

Nor is there merit to the contention that the absence of oral argument deprived Buckeye of a full and fair hearing. In Section 312(c), 47 U.S.C. Section 312(c), Congress provided for an opportunity to "appear . . . and give evidence" but made no provision for oral argument. The Supreme Court has expressly held that under these circumstances, opportunity to show cause

"comprehends, in the light of §4(j) [47 U.S.C. Section 154(j)] and this Court's prior decisions [e.g. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 137-138] that the Commission shall have broad discretion in determining whether and when oral argument shall be required or permitted, as it does with respect to other procedural matters." Federal Communications Commission v. WJR, 337 U.S. 265, 283 (1949). Appellant has not shown -- and does not assert -- that absence of oral argument prevented it from asserting claims relative to the hearing issues that could not otherwise have been presented. Indeed, its argument, both before this Court and in the proceeding below, is devoted in substantial measure to reasserting matters fully considered in the rule making proceeding, bearing out the Commission's belief that no useful purpose would be served by additional proceedings.

In sum, within the procedural framework prescribed by statute, the Commission has broad discretion to fashion the course of its own proceedings. Appellant has shown no violation of law and no abuse of discretion on the part of the Commission.

CONCLUSION

For the foregoing reasons, the Commission's cease and desist order appealed from should be affirmed.

Respectfully submitted,

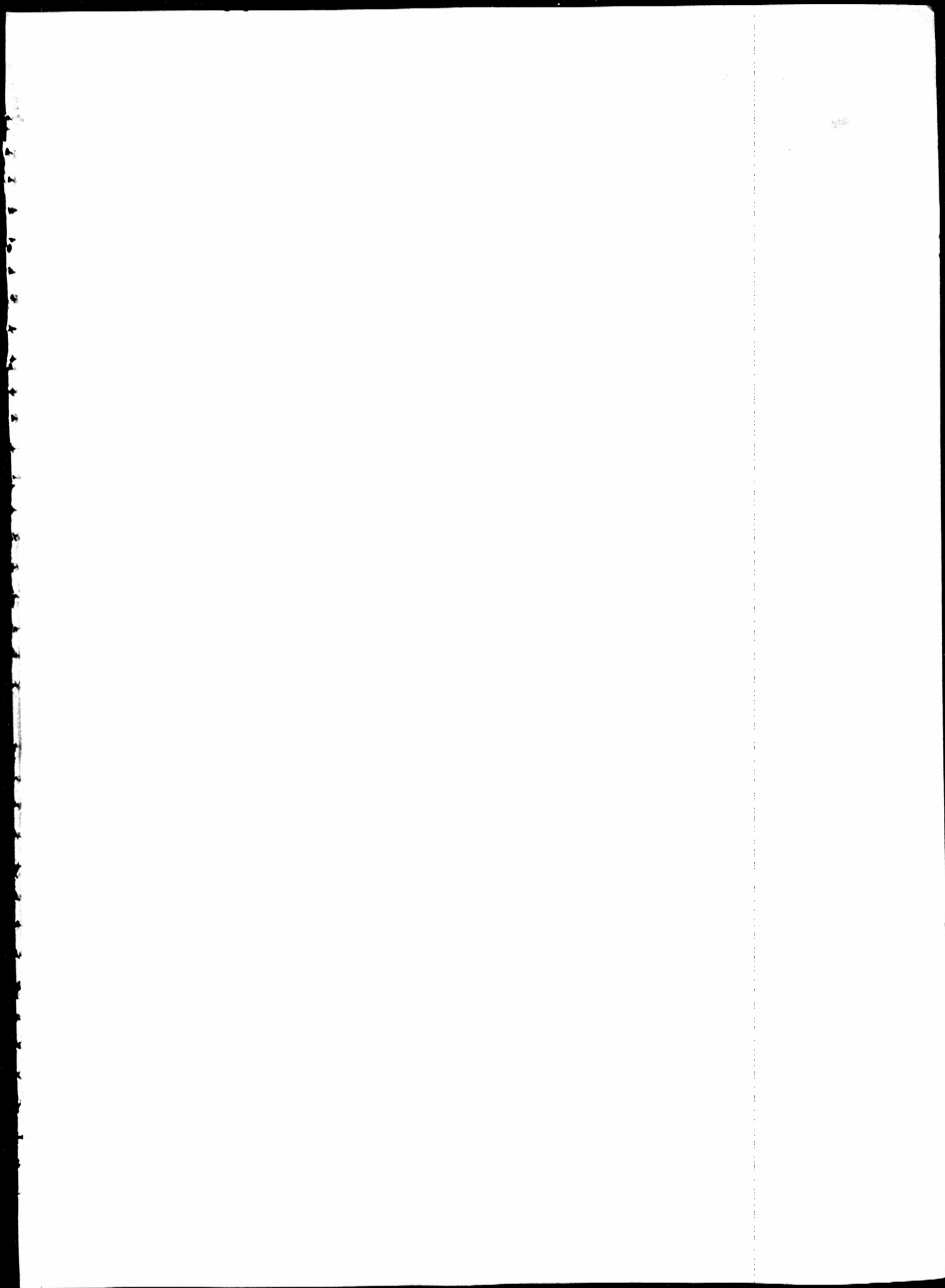
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November 9, 1966



SUPPLEMENTAL BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 20,274

FILED JAN 30 1967

BUCKEYE CABLEVISION, INC.,
Appellant,

Nathan J. Paulson
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

STORER BROADCASTING COMPANY,

D. H. OVERMYER TELECASTING CO.,

THE ASSOCIATION OF MAXIMUM SERVICE
TELECASTERS, INC.,

Intervenors.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

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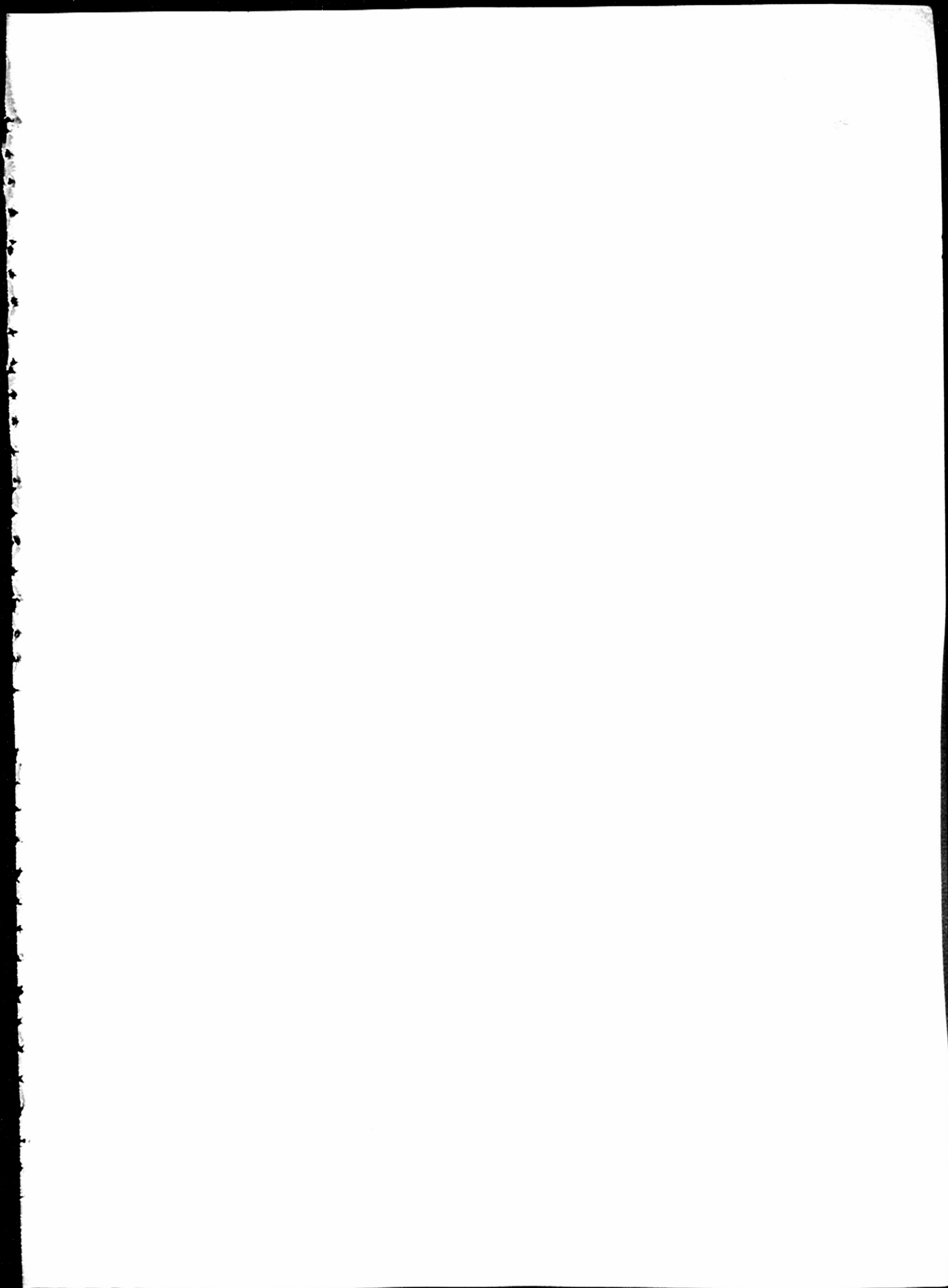


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SUPPLEMENTAL BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

Oral argument on this appeal was held on January 9, 1967. Appellant Buckeye had contended in its Notice of Appeal that the Commission lacked jurisdiction over its CATV system, but it had failed to brief the issue, purporting to reserve the right to brief it at a later time. During the argument, the Court stated that appellant Buckeye would have ten days to file a brief on the issue of the Commission's jurisdiction, and that the point would be

deemed waived upon the failure to file such a supplemental brief. On January 19, 1967 Buckeye's supplemental brief was submitted. The Commission hereby submits its reply.

QUESTION PRESENTED

Appellant Buckeye is the owner and operator of a community antenna television (CATV) system in Toledo, Ohio, the physical facilities of which are located entirely within the State of Ohio. The system makes available to its subscribers for a fee the signals it receives from some ten television stations, including stations located in Toledo, Ohio; Windsor, Ontario; Detroit, Michigan; and (until issuance of the cease and desist order) Lansing, Michigan. The part of Buckeye's service in issue is the carriage of the Lansing station. Buckeye was ordered to discontinue carriage of the Lansing station because, under the terms of Section 74.1107 of the Commission's rules, CATVs may not, in the absence of Commission approval, import the signals of a "distant" television station into a community within the Grade A contour of a television station in one of the top one hundred markets where the Grade B contour does not otherwise reach that community. Toledo is the country's 26th market and is beyond the Grade B contour of the Lansing station. The Buckeye system picks up the Lansing station's signal "off the air" by means of an antenna tower, amplifies the signal by means of electronic equipment at the base of the tower, and transmits it by wire to its subscribers.

In our view, the question presented is whether Buckeye's CATV system is engaged in interstate communication by wire, and is subject to the type of regulation adopted here by the Commission although the system does not require a radio license as a television station.

ARGUMENT

Appellant's CATV System is Engaged in Interstate Communication by Wire or Radio and is Therefore Subject Under the Communications Act to the Type Of Regulation Here Adopted by the Commission.

Our main brief discusses in full the Commission's purpose in regulating CATV systems to the limited degree it deemed necessary to insure that the rapidly growing CATV industry develops in a manner that is compatible with a healthy television broadcast system.^{1/} No attempt has been made to limit the origination or distribution by CATVs of their own programming, no licensing system is established, and no regulation is imposed on fees charged. The rules regulate only the use made of television broadcast signals, limiting that use in order to maintain both a diversified local "free" television service and a supplementary CATV service as components of a nationwide television system. Their basic purpose is to make sure that CATV service will not destroy the basic television service which gives it its substance.

^{1/} Our counterstatement (Br. pp. 2-10) describes the considerations which led the Commission to exert jurisdiction over CATVs.

In the rule making proceeding which led to the adoption of the CATV rules the jurisdictional question was carefully considered. The Notice of Inquiry and Notice of Proposed Rule Making (30 F.R. 6078) requested the views of all interested persons and submitted as the basis for comment a comprehensive memorandum on jurisdiction (J.A. Vol. 1, pp. 478-482^{2/}). The comments submitted on this point were carefully considered and were discussed in some detail in the Report and Order adopting the rules, wherein the reasons given by the Commission for assuming jurisdiction were fully set forth (J.A. Vol. 1, pp. 728-745). In the interest of avoiding needless repetition, we respectfully refer the Court to these discussions as constituting a clear and concise statement of the basis for the Commission's assertion of jurisdiction, and will devote our major effort in this supplemental brief to a substantial summary of the Commission's position and a discussion of the contentions advanced by the appellant before this Court.^{3/}

^{2/} The pagination in J.A. Vol. 1 corresponds to that of the Federal Communications Commission Reports, 1 F.C.C. 2d and 2 F.C.C. 2d.

^{3/} Buckeye asserts (p. 5) that the Commission has failed to justify the proposition that regulation of off-the-air CATV is necessary in order to prevent frustration of the licensing policies of the Commission adopted pursuant to Section 307(b). This Court has already found that the carriage and non-duplication requirements are reasonably related to the public interest. Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), cert. den. 375 U.S. 951. The public interest basis for the major market, distant signal policy is set forth at length in the Second Report, pars. 114-141, (J.A. 770-82).

I.

In the Communications Act of 1934, Congress provided a comprehensive scheme for the regulation of interstate and foreign commerce in communication by wire and radio. The Federal Communications Commission was created in order to centralize authority in a single agency to carry out the Congressional purpose, Section 1, 47 U.S.C. §151.^{u/} The provisions of the Act were made applicable "to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, * * *" Section 2(a), 47 U.S.C. §152(a). "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the

^{u/} The text of those portions of the Communication Act on which we rely is set forth as Appendix A to this brief.

service offered by Buckeye and other such systems, it is clear that CATVs are engaged in communication by wire within the meaning of the Act.

Contrary to Buckeye's assertion, we think it clear also that community antenna systems are interstate in character within the meaning of Section 3(e) of the Act. This is so because the transmission of a television station is in interstate commerce, Federal Radio Commission v. Nelson Brother Bond & Mortgage Co., 289 U.S. 266 (1933); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936), and the extension of such an interstate communication by a CATV is a part of the interstate transmission, even though the extension itself be entirely within one state. Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965). Thus in Idaho Microwave this Court squarely rejected the contention now being made by Buckeye that because its physical plant and customers are in one state no interstate service is involved. The Court's opinion states:

The [CATV] facility is used as a link in the continuous transmission of television signals from Salt Lake City to Burley, Idaho. There is no interruption in the flow of the signals, as it is practically instantaneous. Thus, though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communications service when it takes part in the transmission of signals from Utah to Idaho. 122 U.S. App. D.C. at 256, 352 F.2d at 732.

See also California Interstate Telephone Co. v. Federal Communications Commission, 117 U.S. App. D.C. 255, 328 F.2d 556 (1964); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (C.A. 6, 1962), cert. den. 371 U.S. 820; Pacific Telatronics, Inc., 4 Pike & Fischer, Radio Regulation 2d 145 (1964). Whether Buckeye is a common carrier or not is irrelevant to the question of whether interstate commerce is present, and, indeed, even if the community antenna system is deemed merely a reception apparatus, as Buckeye appears to contend, it is nonetheless a part of the interstate transmission of radio signals, Fisher's Blend Station, Inc. v. State Tax Commission, supra; Western Union Tel. Co. v. Foster, 247 U.S. 105 (1918).^{5/}

The Commission has authority under Section 303(h) of the Act, 47 U.S.C. §303(h), to "establish areas or zones to be served by any station," and it is commanded by Section 307(b), 47 U.S.C. §307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable

^{5/} It is of interest to note that in proceedings before state regulatory commissions, the National Community Antenna Association has stressed the interstate character of the service rendered. See, e.g., NCTA Brief before the Conn. Public Utilities Commission, Docket 10250, p. 3 (1964).

distribution of radio service to each of the same." It has been further directed to promote the development of UHF stations, in order to achieve an effective nationwide television system. See Section 303(s) 47 U.S.C. §303(s).^{6/} The Commission also has broad authority to perform all acts necessary to the execution of its functions. Sections 4(i), 303(r), 47 U.S.C. §§154(i), 303(r).

As this Court has already held, it would be unrealistic to ignore the fact that a community antenna system is in practical effect (as well as in legal contemplation) a part of the transmission of the television signal to the public. Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955). This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), it follows that the Commission has authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to

^{6/} This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d, p. 3 (1962). Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Report (J.A. 468-71, 770-71).

prevent frustration of the Congressional scheme of television regulation, in particular the mandate of Sections 307(b) and 303(s).

In view of these considerations, the Commission concluded (J.A. Vol. 1, p. 730):

* * * CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)). Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. [Footnote omitted.]

II.

Buckeye's chief argument is that the Commission has two principal and separate functions -- to regulate common carriers and to license radio stations -- and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate.

Buckeye gives inadequate recognition to the fact, referred to above, that the Act covers not merely interstate common carriers and those radiating radio signals in the spectrum, but rather "all interstate and foreign communication by wire or

radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States," and specifically "all persons engaged within the United States in such communication or such transmission of energy by radio * * *" Section 2(a), 47 U.S.C. §152(a). Nowhere in the statute has Congress stated that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to import such language into an Act designed to grant to the new Communications Commission not only a centralization of authority theretofore granted to several agencies but also "granting additional authority with respect to interstate and foreign commerce in wire and radio communication." Section 1, 47 U.S.C. §151. If Congress had meant only that wire communication engaged in by common carriers, it would not have referred to "all" interstate communications.

The dichotomy of separate precise common carrier and radio licensing functions urged by Buckeye is not only a concept at odds with the express language of a statute designed to cover all forms of interstate communication, but is one which this Court has already indicated is not consistent with the statute. Thus, in Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 123 U.S. App. D.C. 298, 300,

359 F.2d 282, 284 (1966), in sustaining the Commission's decision that CATV systems are not common carriers, the Court stated:

* * * Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.

* * * * *

Its [the Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation of the CATV systems under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners. This seems to us a rational and hence permissible choice by the agency. [Footnote omitted.]

While the Court stated that it was not ruling on the validity of the Commission's jurisdiction,^{7/} its opinion seems clearly to reject the rigid dichotomy in the statutory scheme that Buckeye seeks to advance.

^{7/} The decision states in this connection, however, that "certainly the Commission's assertion of jurisdiction over CATV systems, . . . is substantial enough to serve as a basis for declining to regulate them as common carriers." Id.

This Court has sustained the Commission's decision to examine the impact of CATV operations upon television broadcast service in connection with the grant of a common carrier radio license to serve a CATV system, and in doing so it rejected the argument that considering the competitive consequences of the grant was to bring "broadcast" regulation into the common carrier field. Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 96, 321 F.2d 359, 362 (1963), cert. den. 375 U.S. 951. The Court stated, "It [the Commission] cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended. 47 U.S.C. §151 (1958)."^{8/}

^{8/} It is significant that this Court, dealing with common carrier regulation in the Carter Mountain case, and the Supreme Court, dealing with broadcast regulation in National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943), both referred to Section 1 of the Act, which states the Congressional "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges; * * *". This demonstrates that the Act does not perpetuate narrow and disconnected regulatory concepts, but rather creates a unified mode of regulating all interstate communications under an empirical public interest test.

The Commission's authority flows not merely from the general relationship of CATV operations to the efficient use of the television portion of the spectrum, but also from the fact that the CATV system makes use of a radio signal which it picks up and carries beyond its normal range. The Commission clearly has the power to prevent frustration of its duty to prescribe the areas to be served by television stations.

Buckeye places its sole reliance for its compartmentalizing view of the Act upon Regents of Georgia v. Carroll, 338 U.S. 586 (1950). Its reliance on that case, however, is clearly misplaced. There the Commission found that the public interest would not be served by a renewal of station license because the licensee's contracts with a third person jeopardized its financial ability to operate in the public interest. The licensee thereafter breached its contracts in order to obtain a renewal of license. The question before the Supreme Court was whether the Commission's action was a valid defense to a state court action for breach of contract under state law, and the Court held that the Commission could not affect the rights of the parties under the contracts. It was in this context that the Court stated (338 U.S. 598-599) that the Commission's regulatory powers center around the grant of licenses. The simple distinction between Regents v. Carroll and this case is that the other party to the contracts in that case was not a person

engaged in interstate communication by wire or radio while Buckeye
is.^{9/}

More in point than Regents, we think, is American Trucking Associations v. United States, 344 U.S. 298 (1953). In that case the Interstate Commerce Commission adopted rules governing the use by regulated motor carriers of leased and interchanged equipment. The purpose of the rules, as the Court stated (344 U.S. at 310), "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." Although the leasing practices proscribed by the new rules were nowhere specifically committed to the agency's jurisdiction by the statute, and the leased equipment was otherwise exempt from regulation, the Court sustained the regulation on the basis of the grant of general rule making power necessary for enforcement of the Act's provisions, recognizing that the specific powers granted would be meaningless without the correlative power

^{9/} The Court noted that the Commission could not issue cease and desist orders and had not even asked for such authority against non-licensees. It is significant to note in this connection that the cease and desist provisions of Section 312 of the Act, 47 U.S.C. §312, enacted subsequently in 1952, authorize the issuance of cease and desist orders addressed to "any person," in recognition of the fact that the statute covers some persons who are not radio licensees. Whether or not that power would reach one dealing with a licensee who is not himself directly subject to the Act, as is Buckeye, need not be decided here.

to prevent frustration of the Act's purposes. It stated (344 U.S. at 311):

So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress. Included in the Act as a duty of the Commission is that "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." §204(a)(6). And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," regulation of which is vested in the Commission by §202(a). See also §203(a)(19).

The situation now before this Court is at least as strong for affirmation as that before the Supreme Court in American Trucking Associations. An operation which is unquestionably comprehended by the statute as an interstate communication has raised the spectre of frustration of enforcement of the Act, and so may be dealt with under the broad rule making powers conferred by Congress on the Commission.

In sum, the communications field is one wherein Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation" because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943). Since CATV systems extend the service area of television stations (a matter committed to Commission concern under

Section 303(h)), are interstate commerce communications coming within the Act's provisions (Sections 2(a), 3(a) and (e)), and have the capacity to frustrate the fair and efficient allocation of television service which the Commission is commanded by Section 307(b) and 303(s) to achieve, the Commission properly invoked the authority given it by Sections 4(i) and 303(r) to make rules and regulations, not inconsistent with the Act, to carry out its functions and the provisions of the Act.

CONCLUSION

The Commission's CATV rules are consistent with the Act and necessary to its enforcement. For the reasons set forth, we urge that they have been adopted within the confines of the authority granted by Congress.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

January 30, 1967

APPENDIX A

Communications Act of 1934

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Sec. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Sec. 3. For the purposes of this Act, unless the context otherwise requires--

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

*

*

*

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

Sec. 4(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(h) Have authority to establish areas or zones to be served by any station;

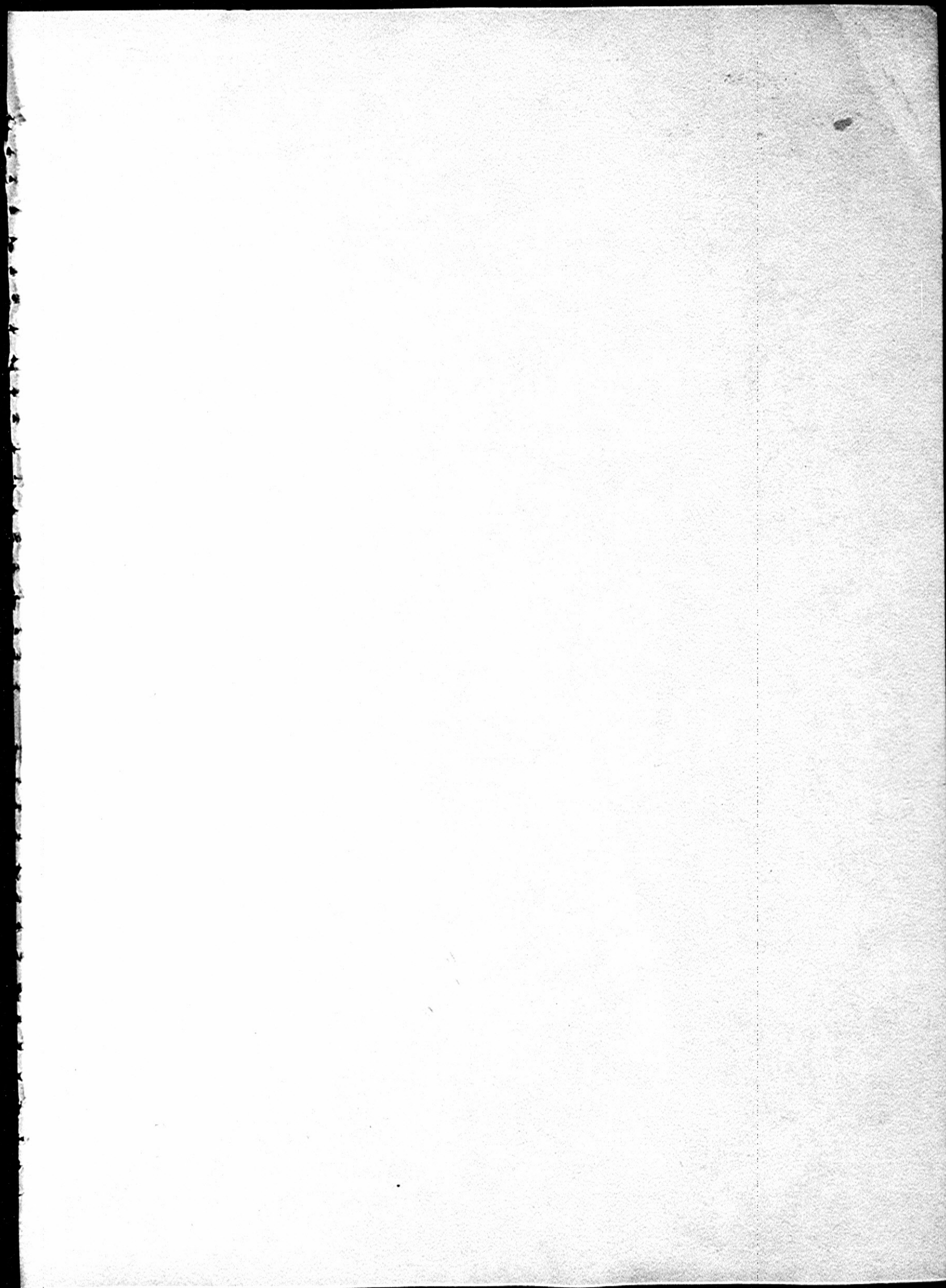
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(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 312 (b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.



BRIEF FOR INTERVENOR
D. H. OVERMYER TELECASTING CO.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING CO., and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

Appeal from an Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 9 1966

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November 9, 1966

(i)

STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are set forth on Page (i) of Appellant's Brief.

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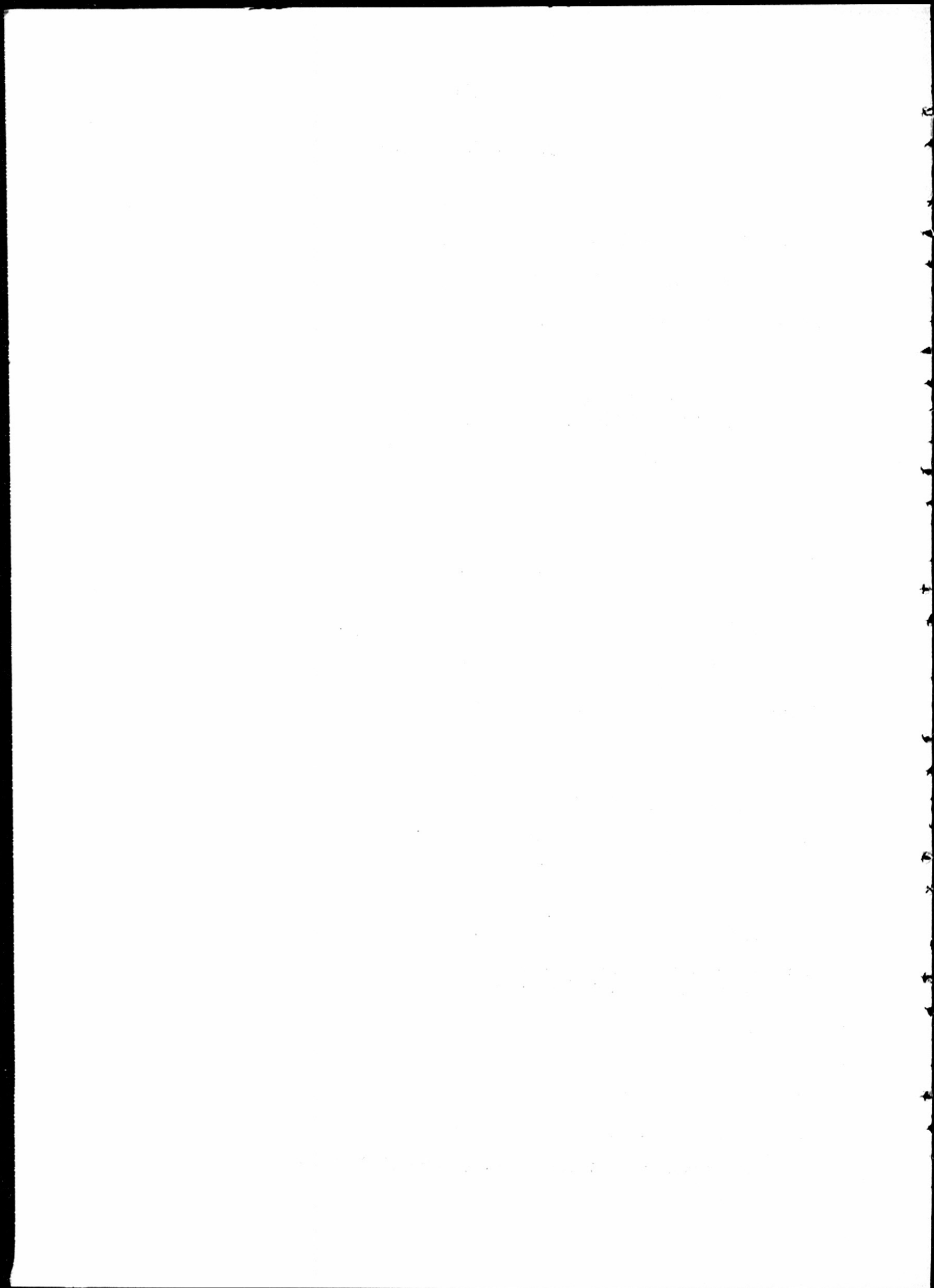
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* Cases chiefly relied upon are marked with an asterisk.



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BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

Intervenor D. H. Overmyer Telecasting Co., which operates UHF Television Station WDHO-TV on Channel 24 in Toledo, Ohio (R. 10) and participated in all stages of the proceeding below, concurs in the Counterstatement of the Case as set forth in the Brief for Appellee.

SUMMARY OF ARGUMENT

The CATV Rules represent a wholly proper and reasonable exercise of the Commission's broad regulatory authority under the Communications Act (47 U.S.C. 151, *et. seq.*). The Commission has demonstrated the basis for its action and has established that the Rules are urgently required in the public interest. Specifically, the Commission has detailed the serious adverse effects which CATV entry into major markets may exert on UHF operation and has concluded, in view thereof, that where CATV systems propose to carry the signals of distant stations, their entry into major markets should be authorized only upon a hearing record giving reasonable assurance that it would not thwart the development of the nationwide television allocation system. The Court should not disturb the Commission's conclusions in this respect, for having determined that the Agency has clear authority under the Act for the adoption of the CATV Rules, the Court's duty is at an end.

ARGUMENT

I.

THE ADOPTION OF THE CATV RULES REPRESENTS A WHOLLY PROPER EXERCISE OF THE COMMISSION'S BROAD REGULATORY AUTHORITY

The Commission's adoption of the CATV Rules represents a wholly proper and reasonable exercise of its broad regulatory authority under the Communication's Act of 1934, as amended (47 U.S.C. 151, *et. seq.*). See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Thus, as the Supreme Court stated in the *NBC* case:

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast

potentialities of radio . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." (319 U.S. 190, 217, 219).

The Commission's CATV action was clearly warranted under such "expansive" and "comprehensive" powers.

Moreover, contrary to the Appellant's contention (Appellant's Brief, pp. 14-15), the Commission has fully demonstrated that the new CATV Rules are required in the public interest. In its *Second Report and Order*, 2 FCC 2d 725 (1966), adopting the CATV Rules, the Commission explained in detail the basis and necessity for its action. Thus, the Commission first spelled out the serious adverse effects that CATV entry into major markets could have on UHF operation:

"There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12 or 20 channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50% or over), the UHF stations might face a very difficult hurdle. The audience for non-network stations is limited (about a 10% share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the non-network programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of common sense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive non-network programming. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programming. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly

the limited audience interested in viewing non-network programming in the prime listening hours Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest 'in the larger and more effective use of radio' (Communications Act, Section 303). In short, the problem posed is whether, if CATV succeeds greatly for example, to the 50 to 85% figure predicted by its optimistic proponents — there is correspondingly a grave danger to UHF broadcasting." (Par. 123).

The Commission then concluded, in light of the foregoing, that it "must thoroughly examine the question of CATV entry into the major markets and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of Congressional goals" (Par. 140). The Commission stressed that it "can not sit back and let CATV move signals about as it wishes and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, 'Oh well, so sorry that we didn't look into the matter.'" (*Ibid.*). Hence, the Commission explained that, in order to insure that CATV operations in major markets "will be consistent with the public interest":

"It is necessary to examine thoroughly such operations before they become established or well entrenched [for] once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." (Par. 140).

Finally, on the basis of the foregoing comprehensive findings, the Commission spelled out the procedure it would follow in major markets such as Toledo:

"We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its Grade B into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the marketing studies which have been made relating to it (by either the CATV or broadcast groups in the area), the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans or potential of the proposed CATV operation for pay television, and other important facets. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of a particular case." (Par. 141).

Since the Commission clearly has authority under the Act for the adoption of its CATV Rules, the Court should not interfere with its conclusion that the public interest requires their prompt application. For, as the Supreme Court stated in *National Broadcasting Co., v. United States*, 319 U.S. 190, 224 (1943):

"The Regulations are assailed as 'arbitrary and capricious.' If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 314 U.S. 534, 548, 86 L. ed 432, 443, 62 S. Ct. 366, is relevant here: 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' *Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be*

furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." (Emphasis added).

Similarly, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) the Court noted:

"The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. *The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.*" (Emphasis added).

CONCLUSION

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

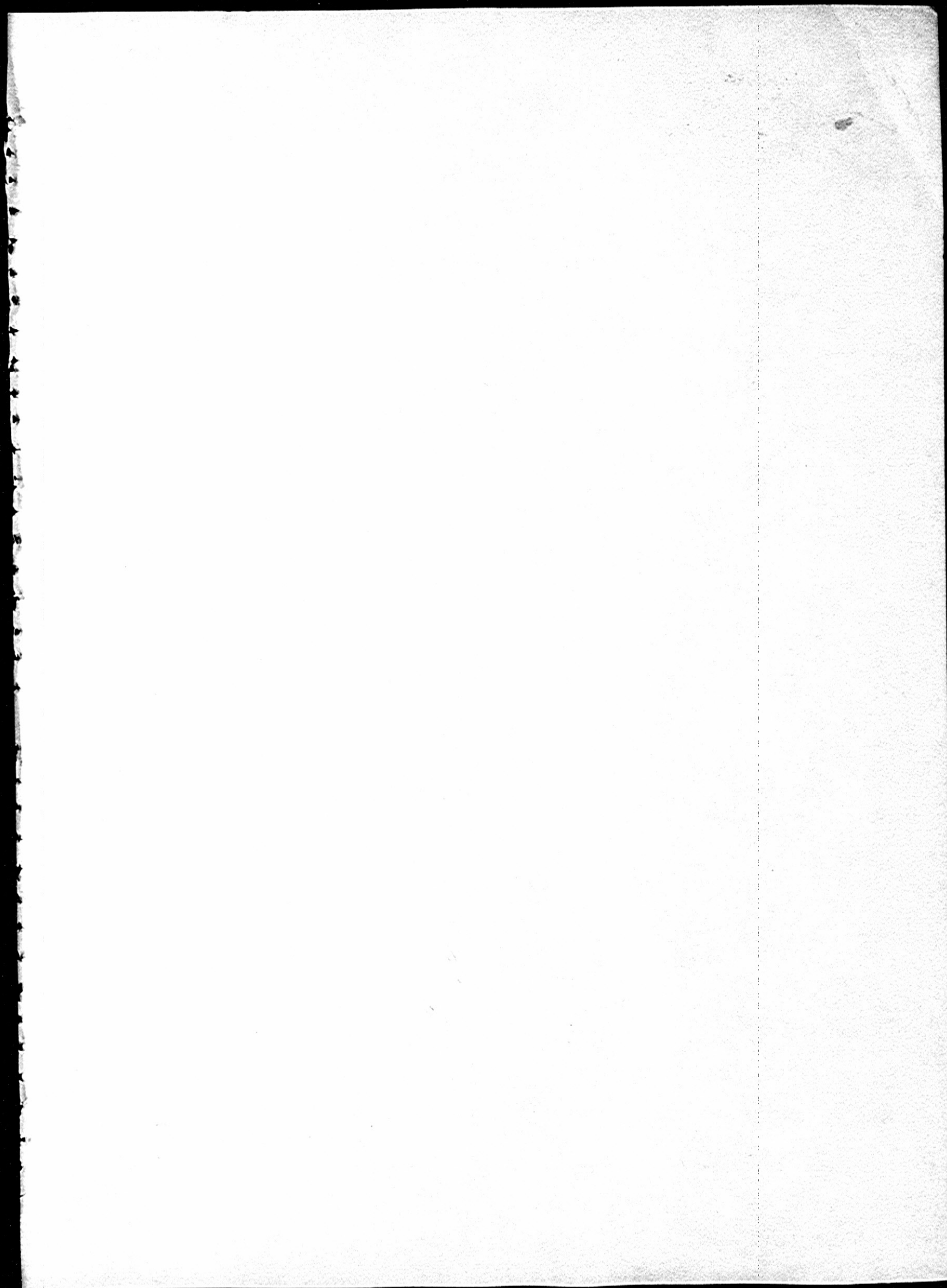
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November 9, 1966



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Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

**D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING COMPANY, and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,**

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

November 9, 1966

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(i)

QUESTIONS PRESENTED

The questions presented are correctly stated by appellant.*

* By agreeing to appellant's statement of questions presented, we do not necessarily concede either that factual characterizations implicit in the questions are accurate or that all of the questions are properly presented by this appeal.

(iii)

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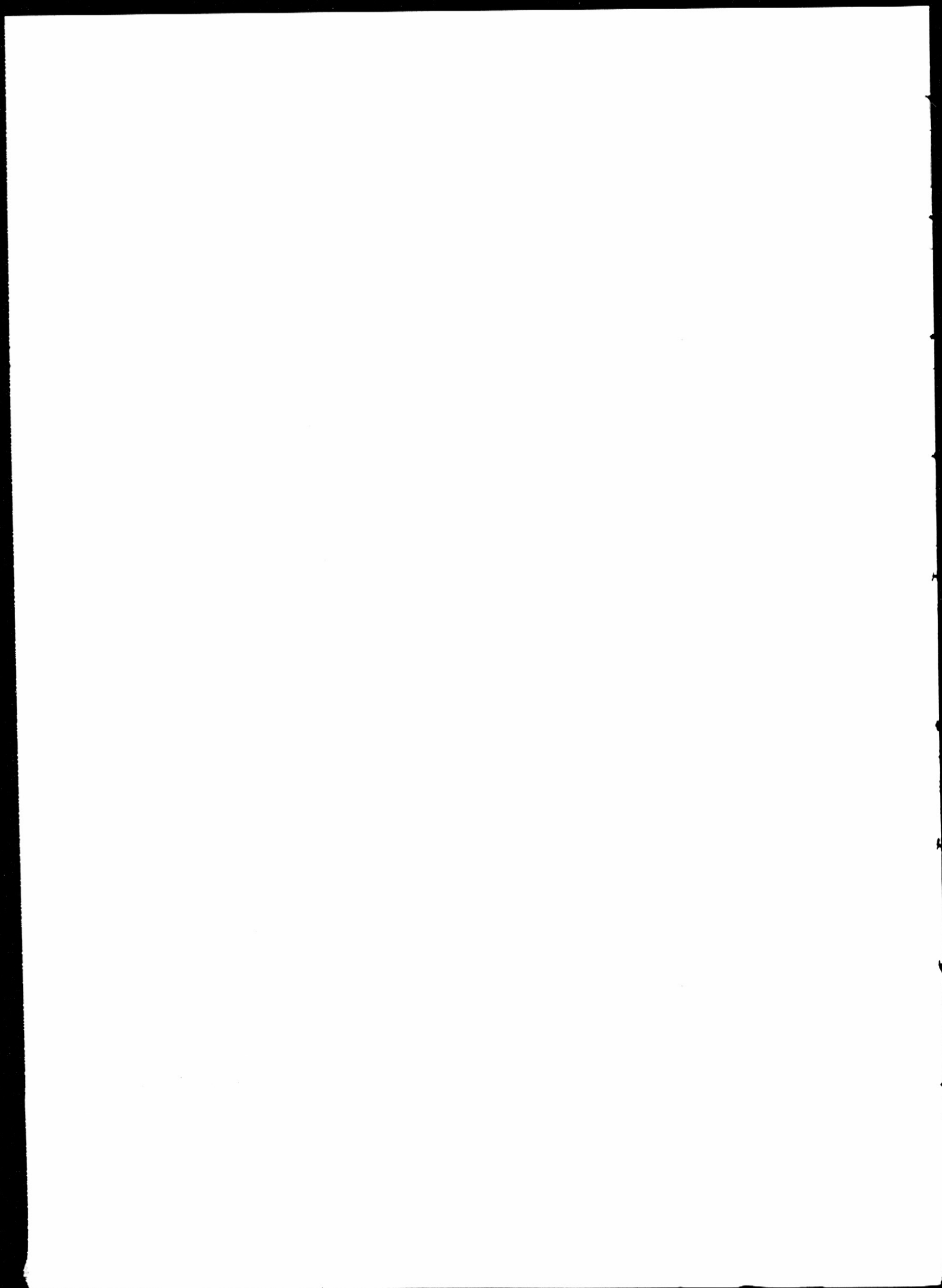
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING COMPANY, and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
STORER BROADCASTING COMPANY

COUNTERSTATEMENT OF THE CASE

We have reviewed appellee's counterstatement of the case and agree with it. Consequently, to avoid burdening the court and the parties we are not submitting a separate counterstatement.

STATUTES AND COMMISSION RULES INVOLVED

The statutes and Commission rules involved in this appeal are printed as an appendix to appellant's brief.

SUMMARY OF ARGUMENT

1. By stating that it will not here brief or argue the "basic" question of its challenge to the Commission's assertion of jurisdiction over all CATV systems, Buckeye must be deemed to have conceded that jurisdiction for the purpose of this appeal. Fair and orderly procedure requires that Buckeye not be permitted to "reserve" the contingent "opportunity" to brief that question later, upon conclusion of litigation in the Eighth Circuit concerning the Commission's authority.

2. The Commission rule, Section 74.1107, requiring that before Buckeye may import distant signals on its CATV system it must show in a hearing that such carriage would not be contrary to the public interest, is not inconsistent with either the First Amendment or the anti-censorship provision of the Communications Act. Limitation of television signal extension is essential to and inherent in virtually all Commission television regulation. Such regulation is no more invalid when the signal extension being regulated is accomplished by CATVs than when accomplished by stations themselves. A re-utterer enjoys no higher protection of its "freedom of utterance" than does the utterer.

3. Buckeye is wrong in suggesting that it was denied the right to participate fully in the extensive rulemaking which led to the adoption of Section 74.1107 because the notice given by the Commission was vague. The Commission's notice of rulemaking, released even before Buckeye obtained a CATV franchise for Toledo, was explicit to the point of setting forth the substance of Section 74.1107 in almost the same words used in the rule itself. Yet neither Buckeye nor its owners filed either comments or reply comments.

4. Similarly, neither the public nor Buckeye was misled by any Commission assurance that new CATV regulations would await further Commission proceedings or Congressional action. The Commission did say that it hoped for Congressional action and that it anticipated further proceedings, but it also expressly invited comments so that it would be in a position to adopt interim or permanent rules without such action or proceedings.

5. Buckeye's final attack on the procedures in the rulemaking proceeding is that its rights were denied because there was no oral argument. But there is no legal requirement of oral argument in rulemaking. That question is left to the Commission's sound discretion. The Commission's action was entirely reasonable. Buckeye did not even ask the Commission for oral argument.

6. Buckeye's attack on the procedures in the show cause hearing is no more substantial. First, Buckeye was not entitled to try in the show cause proceeding all of the issues which might be pertinent to the ultimate question of whether it should be permitted to distribute distant signals on its CATV system. Under the circumstances, the Commission was entirely reasonable in its position that the only issue in the show cause proceeding was whether Buckeye was then in compliance with the Commission's rules, and that Buckeye must await its turn in line before being granted a hearing on the broader issues.

Second, the Commission's determination to dispense with the hearing examiner's initial decision and to order the record certified directly to the Commission for decision was valid under Section 409(a) of the Communications Act. That section authorizes this procedure when "imperatively and unavoidably required for due and timely execution" of the Commission's functions, and, contrary to Buckeye's contention, permits such determination to be made even before the hearing starts. The record before the Commission of mushrooming CATV growth in major markets; of the Commission's own determination in the rulemaking pro-

ceeding that it would impair its regulatory purposes to permit services forbidden by the rules to be provided for any substantial period of time; and of Buckeye's own rapid construction and expansion of its CATV system, fully justified the Commission's action. And, in fact, the Commission issued its decision in the show cause proceeding within four weeks after the record was closed, which could have been accomplished only through this procedure.

7. Contrary to Buckeye's contention, Section 74.1107 is not a retroactive rule. It was made effective on the date of publication in the *Federal Register*, and there was ample good cause under Section 4(c) of the Administrative Procedure Act for it to have been made effective then rather than thirty days thereafter.

Section 74.1107 draws a distinction between CATVs in operation on February 15, 1966, the date the Commission gave public notice of its forthcoming CATV rules, and CATVs, like Buckeye's, which did not begin operation until after February 15. Although it could have applied Section 74.1107 to all CATVs, as it did with other CATV rules, the Commission gave a grandfather exemption from Section 74.1107 to pre-existing CATVs. This was a reasonable exercise of the Commission's discretion and should be upheld. And this would be true even had the inclusion of that grandfather provision made the rule retroactive, which it did not.

ARGUMENT

I.

**For the Purposes of This Appeal Buckeye Has
Conceded the Commission's Authority
To Regulate All CATV Systems**

Buckeye states (App. Br., p. ii)¹ that the question of the Commission's jurisdiction over all CATV systems "is basic in this case." However, that question is to be found neither in Buckeye's statement of questions presented nor in its argument. Instead, after pointing out that the question of Commission jurisdiction is now pending in the Eighth Circuit Court of Appeals and that Buckeye still has pending before the Commission a petition for reconsideration of the Commission's Second Report and Order in Docket No. 15971, in which the Commission asserted its jurisdiction,² Buckeye asserts that unless directed by this Court it will not brief or argue the jurisdictional question. Instead Buckeye states that:

"In the event this Court is not able to reach a decision favorable to appellant on the matters briefed herein, appellant respectfully reserves the opportunity to brief these other matters before this Court upon conclusion of the Eighth Circuit litigation." (App. Br., p. ii)

On the basis of the same considerations, Buckeye, on August 4, 1966, filed a motion with this Court asking that this case be held in abeyance pending the outcome of the proceeding before the Eighth Circuit. That motion was denied. Consequently, we submit that Buckeye cannot now be

¹ Appellant's brief is cited as "App. Br."; citations to the record are to "R.," except for the hearing transcript before the Commission, which is to "Tr.," throughout this brief.

² In that petition for reconsideration, as here, Buckeye asserted that the Commission does not have jurisdiction, but expressly confined the substance of its petition to other matters.

heard to "reserve the opportunity" to brief the jurisdictional question later. Instead, for the purposes of this appeal it must be taken to have conceded the Commission's jurisdiction. It cannot be permitted to impose upon the Court and the parties a contingent double briefing schedule.³

Buckeye could have briefed the jurisdictional question here if it had wished to do so. The Commission has thoroughly documented its jurisdiction over non-microwave CATVs in a cogent four-page appendix to its *CATV Second Report and Order*, 2 F.C.C.2d 725, 793-97 (1966), as well as in that order itself. *Id.* at 726-34. Having elected not to attempt to meet the force of the Commission's jurisdictional statement, Buckeye must be held to its election here.

³ While we have been unable to find in a decided case an exact duplicate of Buckeye's attempt here, judicial repudiation of similar attempts can be found, *e.g.*, Rule 17(g) of this Court, interpreted in *Schooler v. Schooler*, 84 U.S. App. D.C. 147, 151, 173 F.2d 299, 303 (1948) ("Both fairness to our appellees and our obligation to other litigants required that we should not permit this appeal, after it has been presented and lost on one basis, to be presented again on an opposite basis."); *Red River Broadcasting Co. v. Federal Communications Commission*, 69 App. D.C. 1, 5-6, 98 F.2d 282, 286-87 (1938) ("To permit . . . [an interested] person to stand aside and speculate on the outcome [at the Commission]; if adversely affected, come into this Court for relief, and then permit the whole matter to be reopened in his behalf, would create an impossible situation."); *Colorado Radio Corporation v. Federal Communications Commission*, 73 App. D.C. 225, 227, 118 F.2d 24, 26 (1941) ("We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence."); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (Even where an issue not raised below might be reviewed because of the requirements of fundamental justice, the Court will not do so when petitioner has expressly waived reliance upon that issue).

II.

**Buckeye's First Amendment Claim Is Mistaken:
A "Re-utterer" Is Entitled to No More
Protection Than the "Utterer"**

Buckeye argues that the Commission's CATV rules, particularly Section 74.1107, abridge its constitutional right "to distribute information and entertainment free from governmental interference" (App. Br., p. 13). But the essence of the Commission's duty and authority under the Communications Act is to prescribe and therefore limit the reach of broadcast service from particular stations or sources — geographically and in countless other ways — thereby limiting "freedom of utterance" in broadcasting. This does not violate either the First Amendment, *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943), or the anti-censorship provision of Section 326 of the Act. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 98, 321 F.2d 359, 364 (1963); *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 257, 352 F.2d 729, 733 (1965). What Buckeye truly seeks is to foreclose the Commission from limiting service extension when accomplished by CATV.

This Court has held in *Idaho Microwave, supra*, that a CATV's rights under the First Amendment are not abridged, and Section 326 is not violated by the Commission's CATV non-duplication rule, which imposes a prohibition on CATV distribution of certain programs. *Ibid.*⁴ We think that holding is controlling here.

Further, we believe no case exists which holds that a re-utterer is entitled to a higher degree of First Amendment protection than is the utterer.⁵ The Commission, through its table of television allocations,

⁴ "Similar contentions were rejected by . . . [this Court] in the *Carter Mountain* case." *Ibid.*

⁵ Certainly no case cited by Buckeye holds to that effect, or even bears on the question.

its transmitter power limit rules, its antenna height limit rules and other regulations, has acted to limit the extension of television signals so as to protect the public interest in diverse local broadcasting and to comply with the requirements of the Communications Act.⁶ Buckeye's contention necessarily implies that the First Amendment *protects* against regulation such television station signal extension when accomplished by CATVs, but not when attempted by the stations themselves. This contention is without merit.

For example, Section 325 of the Communications Act prohibits a station from rebroadcasting a program without the permission of the originating station. When viewed against the First Amendment, that section has at least the same restrictive effect as the rules Buckeye challenges here. The only difference is that Buckeye has a CATV system, not a station. That difference is obviously immaterial in this context.

Moreover, Section 74.1107 does not prohibit Buckeye from distributing the information and entertainment broadcast by Lansing station WJIM-TV. Rather it requires Buckeye, before being authorized to do so, to show in a hearing that such distribution will not impair the public interest in development of local UHF broadcasting.

III.

Buckeye and Its Owners, Cox and the *Toledo Blade*, Had a Year of Notice About Section 74.1107 and Opportunity, From 1962 Until 1966, To Participate in CATV Rulemaking, but Did Not Do So

Buckeye claims that it had inadequate notice with respect to Section 74.1107, and, therefore, that it was denied its right, under Section 4(a) and (b) of the Administrative Procedure Act, 5 U.S.C. § 1003(a) and (b),

⁶ Particularly Sections 1 and 307(b). See, e.g., FCC Rules and Reg., Sections 73.606 (table of assignments), 73.610 (minimum mileage separations), 73.614 (power and antenna height requirements), 73.655 (limitations on rebroadcast), 73.685 (transmitter location).

to full participation in the rulemaking procedure and, consequently, that its Fifth Amendment rights were also abridged (App. Br., pp. 16-25). But Buckeye and its two owners are large and presumably sophisticated members of the broadcasting, CATV and newspaper industries.⁷ Buckeye has never claimed that it had no actual knowledge about the rulemaking, nor could it. Indeed, Storer challenged Buckeye to deny that it had actual notice and it did not (R. 96).

Buckeye's claim is, therefore, an abstract assertion that the notice

⁷ Buckeye Cablevision, Inc. is owned 55% by the Toledo Blade Co. which owns both of the newspapers in Toledo, Ohio (*Editor and Publisher Yearbook*, 210 (1966)) and 45% by Cox Cablevision Co. Buckeye, Petition for Reconsideration, Docket No. 15971, p. 1, March 25, 1966; *Television Factbook*, 228-c (1966). The Cox group is a large newspaper and radio and television station owner. Cox Broadcasting Company owns television stations in Dayton, Ohio, Atlanta, Georgia, Charlotte, North Carolina, Oakland-San Francisco, California, and Pittsburgh, Pennsylvania. *Id.* at 219-c. Cox also owns radio stations in Dayton, Atlanta and Charlotte, and in Miami, Florida. *Ibid.* Its stock is traded on the New York Stock Exchange. (Judicial notice requested.) For the first six calendar months of 1966, Cox Broadcasting Company enjoyed sales of \$18 million, pre-tax earnings of \$5.5 million and net earnings of \$2.7 million. *Television Digest*, July 25, 1966, p. 12.

Cox Cablevision, Inc. has extensive CATV system, equipment manufacturing and microwave interests. It owns three CATVs in Pennsylvania, eight in Washington and four in Oregon. It owns 50% of Ohio Cablevision, Inc., which has a CATV in Findlay, Ohio. It owns 25% of the CATV franchise for Redding, California. *Television Factbook*, 233-c (1966). Cox Cablevision also has a minority interest in Columbus Communications Corporation, which holds CATV franchises in Vernon and North Vernon, Indiana. *Ibid.* Cox Broadcasting and the *Cleveland Plain Dealer* own Cleveland Area TV, Inc., which holds CATV franchises in Beachwood and Shaker Heights, Ohio. *Id.* at 232-c. Buckeye, in addition to owning the CATV system in Toledo, Ohio, holds CATV franchises in Maumee and Sylvania, Ohio. *Id.* at 228-c. Cox Cablevision owns 17% of Trans-Video Corporation. Trans-Video owns six operating CATVs in California including the San Diego, California CATV. Trans-Video also owns five CATVs which are either under construction or franchised. It has two CATV subsidiaries, Mission Cable Co. and Pacific Video Cable Co. *Id.* at 242-c. Cox Cablevision owns Video Service Co., a CATV microwave operator in Indiana. *Id.* at 233-c. Video Service is also an applicant for a CATV franchise in Dayton, Ohio (*id.* at 159-c), where Cox owns both the morning and evening newspapers. *Editor and Publisher Yearbook*, 202 (1966). Cox Cablevision also owns 50% of Kaiser-Cox Corporation, a CATV equipment manufacturer.

given by the Commission with respect to Section 74.1107 was inherently vague (App. Br., p. 18).⁸ But Buckeye is wrong, both in the abstract and in the particular. *The Notice of Inquiry and Notice of Proposed Rule-making*, 1 F.C.C.2d 453 (1965)⁹ devoted five printed pages to the problem of CATV impact on the development of new local UHF stations in major markets. *Id.* at 468-72. It established an interim procedure, pending the adoption of new rules, requiring that:

"[A]pplications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) *must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area.* A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the Grade B contour of such three or more commercial television stations), any new UHF television station would be independent in operation." *Id.* at 471. (Emphasis added.)

Further, the Commission requested that:

"In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the non-microwave CATV system in the same type of situation (e.g.,

⁸ We think a claim of vagueness which fails to state what was said in the notice is disingenuous.

⁹ Hereinafter cited as 1965 CATV Notice.

through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community)." Id. at 472. (Emphasis added.)

There is nothing vague about these statements. The 1965 CATV Notice was released almost a year before Buckeye began operation and almost a month before Buckeye obtained a franchise for its Toledo CATV.¹⁰ Toledo clearly fell within both the market categories described above. It is a community with five commercial television channel assignments (FCC Rules and Reg., Section 73.606). The Commission's records show that the application by intervenor Overmyer for a UHF third commercial station was filed on April 4, 1963 and granted on March 10, 1965. An application for a UHF fourth commercial station was tendered on November 11, 1965.¹¹ Toledo is also within the Grade B contour of at least the three VHF Detroit network-affiliated stations. See 3 F.C.C.2d 798, 800. The Commission's notice clearly complied with the requirement of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a), that it set forth the "substance of the proposed rule or a description of the subjects and issues involved." *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 346, 210 F.2d 24, 28 (1954); *Owensboro On The Air v. United States*, 104 U.S. App. D.C. 391, 397, 262 F.2d 702, 708 (1958). Buckeye cites no cases to the contrary.

¹⁰ Buckeye obtained its CATV franchise from the Council of the City of Toledo on May 17, 1965 (R. 1) and began operation on a test basis on March 16, 1966 (Tr. 73). The 1965 CATV Notice was released on April 23, 1965.

¹¹ That application was dismissed on August 24, 1966.

IV.

Buckeye's Claim That the Public Was Misled Into Believing That No CATV Rules Would Be Adopted Prior to Further Commission Proceedings and Congressional Action Is Wrong, as Well as Irrelevant.

Buckeye claims that "the public was misled," by the 1965 CATV Notice¹² into believing that the Commission would issue a further notice and await Congressional action, before adopting new CATV rules (App. Br., pp. 19-20). But Buckeye never claims that it was misled. Its contention is, therefore, irrelevant.

We think that the portions of the 1965 CATV Notice, quoted *supra*, pp. 10-11, must have put Buckeye, Cox and the *Toledo Blade* on notice not only that the Commission might adopt a new major market CATV rule, but also as to what the substance of that rule would be. It is true that the Notice stated that there would probably be further proceedings. But the Commission was careful to make it clear that this was a probability, not a certainty. It stated:

"[I]n order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above.

* * *

"Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Com-

¹² We note that Buckeye consistently refers to this notice as a Notice of Inquiry, neglecting to refer to the fact that it was also entitled a Notice of Proposed Rulemaking.

mission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate, as requested by one of the petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." *1965 CATV Notice, supra* at 476-77.

Despite these warnings neither Buckeye nor its owners filed comments or reply comments in response to the Notice. Thus, Buckeye chose to gamble (1) that the Commission would not adopt either interim or permanent rules without further proceedings, (2) that it would get its Toledo CATV into operation before the new rules became effective, and (3) that the new rules would exempt existing CATVs from the proscriptions of the new rules, a decision which the Commission had never suggested it would make. In order to be able to carry one of its nine television signals, Buckeye is required by the new rules to show in an evidentiary hearing that local UHF broadcasting will not be impaired. To that limited extent it has lost its triple gamble. It has a right to gamble, but certainly no constitutional or statutory right to be insured against the possibility that it might lose.

Similarly, with respect to Congressional consideration of the CATV problem, the Commission made legislative proposals in its *CATV Second Report and Order, supra* at 787-88, and testified before Congressional committees urging Congressional action. *Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce*, 89th Cong., 1st Sess., ser. 18, at 48-134 (1965); *Hearings Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess., ser. 16, at 3-120 (1965). But it made no commitment that if Congress did nothing, neither would the Commission. Its action in conducting a rulemaking proceeding while Congress was considering the CATV problem showed clearly that it had no such intention.

V.

**Buckeye Had No Right to an Oral Hearing as a Part of the
Commission's Rulemaking, nor Would an Oral Hearing
Have Been of Assistance to the Commission.**

Buckeye argues that it had a statutory or constitutional right to an oral hearing as part of the Commission's rulemaking and that this was denied it (App. Br., pp. 22-25). But Buckeye had no right to an oral hearing. It did have a right to ask the Commission to exercise its discretion to grant such a hearing. However, neither Buckeye nor its owners filed comments in the proceeding, either to ask for a hearing or for any other purpose.

Moreover, Section 4(b) of the Administrative Procedure Act expressly permits the adoption of rules, "with or without opportunity to present...[data, views or arguments] orally" being afforded. In "rulemaking, there is no constitutional right to any hearing whatsoever." *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 694 (9th Cir. 1949), *cert. den.*, 338 U.S. 860 (1950), and the cases cited therein.

Buckeye seems to believe that because the policy questions with respect to CATV are numerous and complex — which they certainly are — there was a particular "need for oral testimony and 'live' witnesses" (App. Br., p. 24). The opposite seems more true. When issues are as broad and complex and parties as numerous as they were in the CATV rulemaking, carefully prepared data and written comments are commonly far more valuable than oral argument or the taking of testimony. This fact is reflected in the Administrative Procedures Act's requirement that there be hearings in adjudicatory, but not in rulemaking proceedings.

Beginning with its first CATV Notice of Proposed Rulemaking, issued on December 14, 1962, 27 Fed. Reg. 12586 (1962), the Commission has received extensive factual studies, comments and reply comments from dozens of interested parties, providing a staggering volume of data

and argument on all aspects of the CATV problem in general, and on the proposed rules in particular.¹³

VI.

Buckeye's Right to a Full and Fair Hearing in the Show Cause Proceeding Has Not Been Denied.

A. The Commission Properly Limited the Show Cause Proceeding to the Issue of Whether Buckeye Was Complying With Section 74.1107.

Buckeye was granted an evidentiary hearing in the show cause proceeding. The issue in that proceeding was limited to the question of whether Buckeye was then in compliance with the requirement of Section 74.1107 of the Commission's rules that it not import distant signals without first obtaining Commission authorization (R. 3). The Commission further held that, as provided for by Section 74.1107, Buckeye was entitled to a full hearing on the question of whether such an authorization should be granted, but that this hearing should be held later. *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798 (1966). Buckeye complains in essence that it was denied the hearing to which it was entitled in the show cause proceeding because the Commission refused to consider the broader issues in that hearing.¹⁴ To put it another way, Buckeye objects to the

¹³ This office, alone, filed some 380 pages of facts and argument, including an econometric study which has recently been reported by Harvard University in its *Quarterly Journal of Economics*. Fisher and Ferrall, "Community Antenna Television Systems and Local Television Station Audience," 80 Q.J.E. 227-51 (1966).

¹⁴ We think Buckeye's true objection is that it was not permitted by the Commission to use the Commission's cease and desist order as the basis for an untimely second reconsideration of the Commission's CATV rules. For Buckeye has never requested a full hearing, as provided for by Section 74.1107. Had it done so, it would have been required to wait its turn in the processing line. Despite Buckeye's failure to make such a hearing request, the Commission determined to treat Buckeye's petition for waiver of Section 74.1107 as a request for a full evidentiary hearing, to be held when Buckeye's turn in line comes. *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 808, 813 (1966).

fact that it was required to stop importing one distant Lansing television signal into the Toledo market pending a full evidentiary hearing to determine the impact of such importation on the public interest in potential local broadcasting in Toledo.¹⁵

The Commission's reasons for refusing this request were fully explained. They reflect the Commission's valid administrative procedural determination that "... Buckeye, and others similarly situated, comply fully with our rules so that the public will not be led to rely on a service which we may ultimately find not to be in the public interest." *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798, 804 (1966).¹⁶

The two cases relied upon by Buckeye did not hold otherwise:

1. In *C. J. Community Services, Inc. v. Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F.2d 660 (1957), the Commission had, during the late 1940s and early 1950s, delayed in adopting licensing requirements for booster television stations, necessary for receiving television in many rural areas. As a result, the hundreds — if not thousands — of such booster stations which had sprung up across the country, many in mountainous Western areas, were unlicensed and therefore illegal.

This Court refused to accept the Commission's argument that, until the Commission got around to adopting rules, the only alternative to licensed operation of booster stations was no operation. *Id.* at 382, 246 F.2d at 663. It therefore refused to enforce a Commission cease and desist order directed against a community booster station located in the

¹⁵ And, perforce, the impact of other distant signal importation, e.g., from Cleveland, Chicago or New York.

¹⁶ Moreover, were the Commission to permit, pending the outcome of an evidentiary hearing, temporary operation in violation of its rules, public reliance on such operation could become the basis for the Commission's decision. That would be improper. *Cf. Fort Harrison Telecasting Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 347, 354, 324 F.2d 379, 386 (1963).

little town of Bridgeport, Washington, suggesting instead that the Commission "get on" with a rulemaking proceeding. *Id.* at 383, 246 F.2d at 664.

The *C. J. Community* case reflects this Court's dissatisfaction with Commission delay in meeting an important rulemaking need. In *C. J. Community*, it was "clear that the Commission decided it had no discretion, once it found a violation to exist," to refrain from issuing a cease and desist order. *Ibid.* "It even so argued." *Ibid.* The precise holding of the case is that the Commission was wrong, it did have discretion, and it should have exercised it by constructive rulemaking rather than by cutting off the only way many people could receive any television service. Here, the Commission has expressly exercised discretion so as to preserve and foster local television service.

2. In *Booth American Co. v. Federal Communications Commission*, D.C. Cir., Case No. 20,376, September 16, 1966 (per curiam), *further opinion* October 3, 1966 (per curiam), this Court, citing the *C. J. Community* case, has stayed pending determination on the merits a Commission order requiring a CATV not to extend its service. The essence of that determination is that the appellant had good reason to believe from the Commission's February 15, 1966 public notice announcing the forthcoming new rules that the extension of service appellant began on March 4 would be permissible within those rules. Both in its original order and in its order on petition for rehearing, this Court expressly limited its holding to the question of new geographic extension. September 16 Order, p. 5; October 3 Order, pp. 2-3.

The *Booth American* case is not applicable here. Unlike *Booth American*, Buckeye began operating its Toledo CATV after the complete text of Section 74.1107 was released. Further, while the February 15 notice was vague about geographic extension by existing systems, it was explicit about new systems. Within the past month this Court made that distinction clear when, in *Jackson TV Cable Co. v. Federal Commu-*

nications Commission, Case No. 20,488, it refused to stay a Commission order directing a new CATV to cease operation in violation of Section 74.1107. The facts in the *Jackson* case are substantially identical to the facts in this case.

B. The Expedited Procedure Ordered by the Commission in the Show Cause Proceeding Was Imperative to Preserving the Effectiveness of the Commission's CATV Rules in Toledo.

The Commission's show cause order provided that the hearing record should be certified directly to the Commission (R. 1-4). Buckeye objects to this expedition and claims it was so rushed that it was denied a full hearing (App. Br., pp. 35-38). Basing its contention on Section 409(a) of the Communications Act and on *Channel 16 of Rhode Island v. Federal Communications Commission*, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956), Buckeye also claims that it was denied its statutory right to file exceptions to a hearing examiner's decision prior to final Commission decision (App. Br., p. 38).

But there was only one issue in this case: compliance with Section 74.1107. Not only did Buckeye never contend that it was complying with that section, but in addition the record was not closed until Buckeye indicated that it would introduce no evidence with respect to the compliance issue. Tr. 92-93; *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798, 801 (1966). Moreover, the voluminous Buckeye pleadings which were a part of the record before the Commission more than adequately set forth Buckeye's position on the numerous issues argued by Buckeye in this appeal which were not in issue before the Commission.

Similarly, the need for the expedited procedure was clear. Buckeye had "raced the clock prior to the March 17 FCC report and order deadline, and was delivering to 52 homes 8 hours before the 17th." CATV, 3 F.C.C.2d 816, 821-22, quoting *Cable Television Review*, April 4, 1966,

p. 3. There was no reason to believe that the race was over when, on March 25, 1966, the Commission issued its show cause order (R. 1-4).¹⁷ If the Commission was to be able to have the Section 74.1107 evidentiary hearing before thousands of Toledo CATV subscribers had become dependent on Buckeye's illegal service, expedition was imperative.

Section 409(a) provides for elimination of an intermediate decision when expedition is "imperatively and unavoidably required for due and timely execution" of the Commission's functions. The substantial data on mushrooming CATV growth in major markets, the Commission's policy determinations in its *CATV Second Report and Order*, and Buckeye's frantic expansion in Toledo made it clear that if those policies were to be effectively implemented, expedition was essential. *Id.* at 781, *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798, 801-04 (1966). Without it, the purpose of the show cause proceeding, to prevent subscribers from coming to rely on services which might be determined to be adverse to the development of local UHF broadcasting, would be completely frustrated.

Section 409(a) requires that a finding of necessity be made by the Commission "upon the record." Buckeye attempts to suggest that this means the Commission could not order expedition until after it had reviewed the completed hearing record in the show cause proceeding (App. Br., p. 36). This makes no sense. The Commission knew, from the record in its rulemaking, that its show cause proceeding required expedition. The proceeding was, therefore, limited solely to the question of whether the Grade B signal of WJIM-TV (or any other station carried by Buckeye) failed to reach Toledo, *i.e.*, the issue of compliance with Section 74.1107. Completing the record on this issue would not contribute to the Commission decision on the need for expedition. We think that the plain meaning of Section 409(a) is that the Commission's expedition decision

¹⁷ Six weeks later, at the time of the hearing, Buckeye was serving about 1,200 subscribers, and no longer on a test basis (Tr. 74-75).

may be made whenever the record before the Commission shows it to be imperative, not at some arbitrary time or upon a particular record, as Buckeye contends.

The fact is that the Commission carried through on expediting the proceeding, releasing its decision only four weeks after the record was closed (R. 373). This fact alone suffices to distinguish *Channel 16 of Rhode Island v. Federal Communications Commission*, *supra*. The problem in the Channel 16 case was that the Commission's claim that expedition was required was "not convincing in view of the time-consuming process which was ordered." *Id.* at 183, 229 F.2d at 524.

The expedited procedure followed by the Commission here was manifestly required by the circumstances and not an abuse of its discretion under Section 409(a) to omit an initial decision and oral argument thereon. See *RCA Communications v. Federal Communications Commission*, 99 U.S. App. D.C. 163, 167, 238 F.2d 24, 28 (1956). *Cf. Florida Economic Advisory Council v. Federal Power Commission*, 102 U.S. App. D.C. 152, 251 F.2d 643 (1957) (upholding a comparable proceeding by the Federal Power Commission under the identical wording of Section 8(a) of the Administrative Procedure Act).

VII.

That Some CATVs Are Exempted From Section 74.1107 on a "Grandfathered" Basis Does Not Make the Rule Retroactive, nor Would It Be Illegal if It Did.

Buckeye began operation of its Toledo CATV on March 16, 1966 on a test basis (Tr. 81-82). In its brief (pp. 25-32), it objects (a) to Section 74.1107's becoming effective before April 18, 1966, *i.e.*, 30 days after it was published in the *Federal Register*, and (b) to Section 74.1107's applying to CATVs which began operation prior to the date the rule became effective, *i.e.*, March 17, 1966. It claims that no "good cause" was shown by the Commission for making Section 74.1107 effective upon publication

in the *Federal Register* (App. Br., pp. 30-32) and that the grandfathering of only pre-February 15, 1966 CATV makes the rule illegally retroactive (App. Br., pp. 27-30).

A. There Was "Good Cause" for Making Section 74.1107 Effective Upon Publication, as Permitted by Section 4(c) of the Administrative Procedure Act.

As discussed above, in order to avoid a race to begin service — even if only to a few subscribers on a test basis, which in turn would be used to justify greatly expanding service — by many of the 1,200 CATVs franchised but not in operation in March, 1966, the Commission made Section 74.1107 effective on its date of publication in the *Federal Register*, rather than 30 days thereafter. It stressed that no useful purpose would be served by a March 17-April 18 hiatus and that new service might be begun during that hiatus, upon which subscribers would come to rely, but which the Commission might ultimately determine to be adverse to the development of local UHF broadcasting. Thus, in order to achieve an "orderly procedure" and in view of "the desirability of avoiding disruption [of CATV service] as much as possible," the Commission, "rather than . . . waiting passively on the sidelines for the 30-day period to expire," made Section 74.1107 effective upon publication in the *Federal Register*. *CATV Second Report and Order*, 2 F.C.C.2d 725, 784-85 (1966); *CATV*, 3 F.C.C.2d 816, 823 (1966). "Good cause," as required by Section 4(c) of the Administrative Procedure Act was thus shown.

B. The Grandfathering of Only Pre-February 15, 1966 CATV Operations Was a Practical Necessity and Did Not Make Section 74.1107 Retroactive.

In addition to making Section 74.1107 effective upon publication in the *Federal Register*, the Commission provided a grandfather exemption from that rule for all major market CATV operations begun prior to February 15, 1966. While the Commission had reached an accord on the

new CATV rules (including Section 74.1107) by February 14, 1966, the lengthy *CATV Second Report and Order* and the three accompanying separate statements by individual Commissioners were not completed until March 4 and not released until March 8. In view of the enormous general interest in the Commission's deliberations, which had been going on for three days and which were widely discussed in the press, the Commission released, on February 15, 1966, a detailed Public Notice (Mimeo No. 79927) describing its new rules. In that Notice the stated applicability of what became Section 74.1107 to Buckeye's Toledo CATV was unequivocal. *Id.* at 1.

Unless the Commission were to permit, between February 15 and March 17, the dash to the wire which it sought to avoid between March 17 and April 18 by making Section 74.1107 effective on publication in the *Federal Register*, it was necessary either to make clear that the rule, when effective, would apply to all CATV operations begun after February 15, or to issue no notice. In order to avoid disruption of existing service to which subscribers had become accustomed, the Commission had decided to exempt CATV operations in existence at the time it reached its decision. *Id.* at 2. For these reasons, a grandfather procedure was adopted. *Ibid.*

Buckeye does not contend that the Commission lacks authority to regulate all CATVs without regard to the date they commenced operation. Indeed, all of the Commission's CATV rules — and virtually all of its other rules, except those with effective grandfather exemptions — apply without regard to when operation begins.

Nor does Buckeye contend that Section 74.1107's division of CATV operations into pre- and post-February 15, 1966 is arbitrary or discriminatory. Rather, it contends that the major market rule is retroactive and for that reason alone should be judicially frowned upon. But Section 74.1107 was not retroactive. It explicitly became effective on

the day it was published in the *Federal Register*. *CATV Second Report and Order*, 2 F.C.C.2d 725, 789.

C. Grandfathering Provisions Have Been Frequently Used by the Commission and Approved by the Court.

We know of no statute or case condemning a grandfather provision which neither denies equal protection or due process of law nor offends some particular statutory requirement. Certainly Buckeye has cited none. Rather, it relies on a line of cases which holds that an administrative agency must not, in adjudicatory proceedings, impose retroactive penalties for conduct conforming to rules adopted earlier by the agency in its quasi-legislative capacity upon which persons had properly relied.¹⁸ But Section 74.1107 reversed no earlier rule. It is the first major market CATV rule, the product of a year of rulemaking whose public contemplation pre-dates Buckeye's Toledo CATV franchise.

Buckeye confuses grandfather provisions, which confer a benefit by exempting current conduct begun at an earlier date, with retroactivity which imposes a penalty for past conduct, legal at the time it was done. Grandfathering provisions are frequently employed by the Commission, for example, to exempt persons who have made substantial investments in reliance on pre-existing Commission rules which are being changed, and to preserve the public interest in continuation of the service resulting from such reliance. See, e.g., *1964 Multiple Ownership Rules*, 2 Pike & Fischer R.R.2d 1588, 1591 (1964) (adopting duopoly rules which prohibit common ownership of two television stations with substantially overlapping service areas).

In Hearings on Applications for Second VHF Station, 3 Pike &

¹⁸ E.g., *Arizona Grocery Co. v. Atchison T. and S. F. Ry. Co.*, 284 U.S. 370 (1932) (cited in App. Br., p. 26); *National Labor Relations Board v. E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960) (cited in App. Br., p. 27); *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

Fischer R.R.2d 909 (1964), the Commission adopted a new interim standard with respect to applications for major market television stations by owners of existing major market stations:

"Absent a compelling affirmative showing, we will designate for hearing any application filed after December 18, 1964 [the release date] for the acquisition of a VHF station in one of the top 50 television markets, if the applicant or any party thereto already owns or has interests in one or more VHF stations in the top 50 markets; we shall treat likewise any application to acquire interests in two or more VHF stations in these markets if the applicant now has no interests in VHF stations in these 50 markets." *Id.* at 911.¹⁹

As in this case, the interim multiple ownership policy became effective on the date it was released even though it was not published in the *Federal Register* until six days later. 29 Fed. Reg. 18399 (1964).

Cut-off dates with grandfathering effect are applied by the Commission in "freeze" cases and have been upheld by this Court as "a necessary and proper exercise of . . . [Commission] discretion." *Kessler v. Federal Communications Commission*, 117 U.S. App. D.C. 130, 138, 326 F.2d 673, 681 (1963). And such provisions are proper administrative action, even though no advance notice is given, and even though they are made effective on the day announced. *Ibid.*; *Mesa Microwave, Inc. v. Federal Communications Commission*, 105 U.S. App. D.C. 1, 262 F.2d 723 (1958); *Harvey Radio Laboratories, Inc. v. United States*, 110 U.S. App. D.C. 81, 289 F.2d 458 (1961).

The requirements of the Commission's freeze order in *Kessler* were no more procedural and no less substantive than the requirements

¹⁹ The Commission rule affected by the interim policy, Section 73.636, permits common ownership of five VHF and two UHF stations, without regard to market size.

of Section 74.1107. The Commission's purpose in making its *Kessler* order effective without advance notice was essentially the same as the Commission's purpose in making the day it announced Section 74.1107 the grandfather cut-off date, *i.e.*, to prevent a "flood of several hundred hastily prepared applications" by persons attempting to beat the cut-off date. *Kessler v. Federal Communications Commission*, *supra* at 142, 326 F.2d at 685.

**D. Even if Section 74.1107 Were Retroactive, It Would
Not Be Invalid.**

Even if the Commission had made Section 74.1107 effective on February 15 (or any other date prior to March 17), it would not be invalid.²⁰ The cases cited by Buckeye do not hold to the contrary.

In *Litton Industries v. Renegotiation Board*, 298 F.2d 156 (4th Cir. 1962) (cited App. Br., p. 26), for example, the court explicitly upheld,

²⁰ In its argument on alleged retroactivity (App. Br., p. 27), Buckeye makes the confusing suggestion that Congress has expressed its disapproval of retroactive rules in the service requirements of Section 3(a)(3) of the Administrative Procedure Act and the publication requirements of Section 7 of the Federal Register Act, 44 U.S.C. § 307. The point Buckeye appears to be attempting to make is that since it did not have notice of Section 74.1107 through publication in the *Federal Register* prior to that section's becoming effective, it is retroactive.

Aside from the obvious non sequitur of a retroactivity argument based on statutory service and publication requirements, the notice standard of Section 7 of the Federal Register Act is actual knowledge, and that standard applies to Section 3(a) of the Administrative Procedure Act. *Kessler v. Federal Communications Commission*, 117 U.S. App. D.C. 130, 147, 326 F.2d 673, 690 (1963). Cf. *United States v. Aarons*, 310 F.2d 341, 346 (2d Cir. 1962) (criminal case). Buckeye has not claimed, nor can it, that it did not have actual knowledge of Section 74.1107 on the day it was released, March 8, 1966, nine days before its Toledo CATV system began operation.

In *Kessler*, the facts were similar to those here. A freeze order was adopted on May 10 and published in the *Federal Register* on May 16. On May 14, an appellant tendered for filing an application prohibited by that order. The Commission's order refusing to accept the application was upheld. *Kessler v. Federal Communications Commission*, *supra* at 146, 326 F.2d at 689.

despite a claim of illegal retroactivity, a Renegotiation Board rule adopted on March 23, 1951, which excluded certain contracts made with the Government after January 1, 1951, from the requirements of the Renegotiation Act of March 21, 1951, 50 U.S.C. § 1211.²¹

In *National Labor Relations Board v. E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960) (cited App. Br., p. 27), the court said:

"It is not suggested that under no circumstances may an administrative ruling apply retroactively. Indeed, as suggested in *Securities and Exchange Comm. v. Chenery Corp.*, . . . any case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.

* * *

"We think the sound principle applicable is that stated in *National Labor Rel. Bd. v. National Container Corp.* as follows: 'It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an *ad hoc* change in one of its administrative policies, such change may be applied retroactively in an appropriate case. *Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194. . . . The test is whether 'the practical operation of the Board's change of policy . . . [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished.' *N.L.R.B. v. Guy F. Atkinson Co.*, supra, [195 F.2d 149] . . . "' *Id.* at 600 (bracket original). (The *Atkinson* case is also cited by Buckeye, App. Br., p. 27.)

²¹The act was also retroactive, the authority of Congress to make it so being upheld in *Lichter v. United States*, 334 U.S. 742, 789 (1948), *rehearing denied*, 335 U.S. 836 (1948).

The contract which gave rise to the illegal retroactivity claim was made on January 23, 1951. *Id.* at 159, n. 2.

In this case, since the substance of Section 74.1107 was announced as a proposal and all CATVs were warned they might be required to comply with it, all before Buckeye even obtained a franchise, it can hardly be said that Buckeye has suffered an unmerited hardship. Even if Buckeye had suffered as a result of Commission action and even if Section 74.1107 were retroactive, the public interest in preventing CATVs from impairing local broadcasting vastly outweighs Buckeye's hardship. This is particularly true because the only hardship which Buckeye could possibly suffer would be that it not carry one Lansing channel whose programming is substantially duplicated on two other channels carried on the CATV²² before determination at an evidentiary hearing that such carriage is consistent with the public interest in local broadcasting.

In a very difficult case, *Leedom v. International Brotherhood of Electrical Workers*, 107 U.S. App. D.C. 357, 278 F.2d 237 (1960), this Court upheld the retroactive application of a National Labor Relations Board rule which set at two years the maximum permitted contractual bar to representation elections. The contract in issue was entered 16 months before the new NLRB rule was adopted and included a three-year election bar. That the three-year bar conformed to NLRB rules in effect at the time the contract was entered was undisputed. Moreover, that retroactive application of the new rule would work a hardship on the Union "by way of the expense and turmoil of an election and the possibility of losing its representation rights" was not contested by the Board. *Id.* at 361, 363-64, 278 F.2d at 241, 243-44. Rather, the Board contended and this Court agreed that "the considerations of orderly procedure and administrative flexibility outweigh disadvantages to the Union . . ." *Id.* at 363, 278 F.2d at 243.

²² WJIM-TV, Lansing, is a CBS affiliate. *Television Factbook*, 326-b (1966). Two other stations whose signals are carried by Buckeye's Toledo CATV, WTOL-TV and WJBK-TV (3 F.C.C. 2d 798, 800), are also CBS affiliates. *Television Factbook*, 316-b, 504-b (1966).

In reaching its decision, the court noted that: "The vice inherent in retroactivity is, of course, that it tends to destroy predictability and to undercut reliance — both important aims of the law." *Id.* at 360, 278 F.2d at 240. It observed that, "the need for predictability must compete with the need for change," particularly with respect to actions of administrative agencies, where "a rigid rule requesting the agency to proceed in the first instance by rule-making would rob the administrative process of needed flexibility." *Id.* at 360, 361, 278 F.2d 240, 241, *paraphrasing Securities and Exchange Commission v. Chenery Corp.*, 232 U.S. 194, 202 (1947). Here, of course, the Commission did proceed by rulemaking.

Even if the Commission's action in applying Section 74.1107, after March 17, to CATVs beginning operation after February 15 and before March 17, were deemed to be retroactive application of that rule, the Commission's action here would be easier for the Court to uphold than was the action of the Board in *Leedom*, which changed an earlier rule upon which the Union had properly relied. And the impact of the retroactive action by the Board on the Union was substantial. The impact on Buckeye is not.

The keystone of Buckeye's argument is its claim that it was relying on the Commission's policy of having no rule (App. Br., p. 27). But the Commission had no such policy, as Buckeye undoubtedly knew.

CONCLUSION

For the foregoing reasons the Commission's decision should be affirmed.

Respectfully submitted,

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November 9, 1966

**BRIEF FOR INTERVENOR,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

**D. H. OVERMYER TELECASTING CO.,
STORER BROADCASTING CO., and
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,**

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

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November 9, 1966

(i)

QUESTIONS PRESENTED

Intervenor Association of Maximum Service Telecasters, Inc., adopts the statement of the Questions Presented contained in the brief of appellee.

(iii)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,

STORER BROADCASTING CO., and

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR, ASSOCIATION OF
MAXIMUM SERVICE TELECASTERS, INC.

COUNTERSTATEMENT OF THE CASE

Intervenor Association of Maximum Service Telecasters, Inc. ("MST") adopts the counterstatement of the case contained in the brief of appellee.

SUMMARY OF ARGUMENT

1. The CATV distant signal rules and policies do not violate the First Amendment. They merely prevent CATV systems, which are business entities within the Commis-

sion's power to regulate, from accomplishing what television broadcasters are not permitted to accomplish — the transportation of television signals across the country without regard either to the rights of program owners or to the impact on smaller television stations. The distant signal rules and policies do not regulate program content. They merely provide the basis for determining where and under what circumstances television signals may be carried beyond their normal service areas. They promote, rather than hinder, true freedom of speech.

2. The Commission, in adopting the CATV distant signal rules and policies, did not violate Section 4 of the Administrative Procedure Act. First, there was adequate notice of the rule, both in the *Notice of Proposed Rule Making* and in comments of intervenor MST, which proposed rules more stringent than those the Commission either proposed or adopted. Second, the Commission was not required to hold oral argument before issuing the rules and the *Second Report and Order*. No statute contains such a requirement and no case imposes one. Moreover, the rules provide for evidentiary hearings.

3. The distant signal rules are not "retroactive." They apply "grandfather" rights as of the first date on which the Commission announced the substance of its new rules, and hence frantic efforts to get into operation before the rules were formally published in the Federal Register would not "grandfather" a CATV system operating in violation of the rules. This is common and entirely appropriate when an industry is first regulated. This being so, making the rules effective on the date of publication, rather than 30 days later, was justified.

4. The cease and desist proceeding was properly confined to a single issue — compliance with the rules. Appellant has asked for waiver of the rules. The request has been denied but has been treated as a request for a hearing. Many other such requests have been filed. All must wait their turn. What appellant wants is to be heard out

of turn because it was violating the rules. This the Commission should not be required to do.

ARGUMENT

I.

The CATV Rules Do Not Violate the First Amendment

Appellant argues that the CATV rules are unlawful because they place restrictions on appellant's "right" to carry the television signals it chooses to carry, in violation of the First Amendment.¹

We need not stop here to debate the abstract question whether appellant's CATV operations "are protected by the First Amendment." Presumably everyone is so protected, but certainly appellant, no less than a newspaper publisher, is "engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people want," *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and in conducting that business it is subject to reasonable and proper laws and regulations.

The real issue here is whether the Commission, having reached the conclusions on which it based its assertion of jurisdiction to regulate CATV,² has abridged free speech — in the constitutional sense — by limiting a CATV system's merchandising of distant television broadcast signals plucked from the air without the permission of or

¹Although the argument is addressed to the rules generally, only the distant signal rules and their application are involved on this appeal. The order under review does not require appellant to carry any particular television station or to afford any station non-duplication treatment.

²See Second Report and Order, Docket Nos. 14895, 15233 and 15971, 2 F.C.C.2d 725 (1966).

payment to the originating stations, particularly where the CATV system brings into a community many programs for which local and area television stations have exclusive broadcast rights. These activities of a CATV system, according to one court, "could be described as '* * * inconsistent with a finer sense of propriety * * *'" *Cable Vision, Inc. v. KUTV, Inc.*, 355 F.2d 348, 352 (9th Cir. 1964), *cert. denied sub nom. KLIX Corp. v. Cable Vision, Inc.*, 379 U.S. 989 (1965).

In considering this question, it must be assumed that the Commission has jurisdiction to regulate CATV. It must also be assumed that the Commission has properly asserted that jurisdiction in keeping with its purpose, which draws strong support from the express congressional policy underlying the enactment of the all-channel receiver legislation of encouraging the development and expansion of a nationwide system of free television service provided by local and area television stations. As we will show, the Commission commits no violation of the First Amendment when it seeks, not to control program content, but to integrate CATV into this television system.

Television broadcasting was a young industry in the late 1940's, when the Commission undertook to chart the industry's future. AM radio had developed helter-skelter. License grants were made essentially on an *ad hoc* "demand" basis with little effort to relate any particular application, except insofar as electrical interference was concerned, to the number and location of radio stations that were in existence at the time of the application or that could come into existence in the future. The Commission took hold of television at an early stage and developed a comprehensive plan under which available channels were to be allocated to different communities and areas. The allocation plan was designed to satisfy, "so far as possible," two different public interest goals — (1) at least one, and preferably more than one, off-the-air service for "all the people of the United States," and (2) local or area television stations for as many commu-

nities as possible. Maximum fulfillment of the first goal alone would suggest having a substantial number of super-powerful stations in a handful of strategically located cities, and the so-called DuMont plan called for essentially such a channel allocation plan. This approach, however, was thought by the Commission to represent too great a sacrifice of the second goal (because of electrical interference problems). Local and area stations could tailor their programming — for instance, news and discussion of local or regional affairs — to the needs and interests of the people in the communities the stations served, thus giving those people both national and locally oriented programming instead of only the former. The DuMont plan was therefore rejected. Channel allocations were made with an eye toward a balance between the two goals described above. As a necessary corollary, specified limits were placed upon tower heights and transmitter power thus "establish[ing] areas or zones to be served by any stations," Sec. 303(h).³ The Commission's approach was sustained by this Court. *Logansport Broadcasting Corp. v. United States*, 93 App. D.C. 342, 210 F.2d 24 (1954); *Peoples Broadcasting Co. v. United States*, 93 App. D.C. 78, 209 F.2d 286 (1953).

The original Table contemplated use of both UHF and VHF channels. By 1962, there were 500 VHF stations on the air (of a total of 681 channels allocated) but only 103 UHF (out of 1,544 channels allocated). Thus, 93 per cent of the available UHF channels were idle. With little public demand for "all-channel" sets, only 16 per cent of television receivers in American homes in 1962 could receive UHF, and only 6 per cent of sets produced in 1961 could do so. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The House Commerce Committee said:

"If the American people are to have the chance to enjoy the benefits of television service to the

³See Sixth Report on Television Allocations, 1 R.R., Part 3, 91:599 (1952); 47 C.F.R. § 73.606(b).

"fullest degree, then a major portion of the UHF channels not now assigned must be put into operation." (*Ibid.*)

Congress thereupon took the extraordinary step of enacting the "all-channel" receiver law, which enabled the Commission to require all television sets shipped in interstate commerce (or imported from abroad) to be capable of receiving all of the UHF and VHF television broadcast frequencies. Act of July 10, 1962, 76 Stat. 150, adding Secs. 303(s) and 330 to the Communications Act. The Commission has implemented the statute by appropriate regulations, 47 C.F.R. § 15.65(a).

The all-channel receiver law is a clear congressional approval of the policy decisions that underlay the adoption of the Table of Allocations. The House Committee Report declared "the goal" to be

"a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." (*Id.* at 3.)

And the Commission has voiced the fear that this goal will be frustrated if CATV systems are permitted to transport television signals from a few huge metropolitan areas like New York, Los Angeles and Chicago into other communities throughout the United States.

Underlying the Commission's concern is a basic proposition of broadcasting economics, *viz.*, that a station's revenues — and hence its ability to survive and to offer quality programming — is a direct function of its audience. If the people of a community could view not only the local and area stations but also a number of stations from the large metropolitan areas, the local and area stations would suffer a sharp reduction in their audiences.

If these stations were driven off the air, to take the extreme case, the community would not even have "at least one television station as an outlet for local self-expression," the bare minimum contemplated in the House Report for "all communities of appreciable size." If local and area VHF stations survived but existing or future UHF stations did not, the community would suffer a reduction of present service or would not enjoy an increase in service, and the higher prices the people paid for television sets because of the all-channel receiver law would be wasted. Even if all local and area stations were able to operate, the audience fragmentation would almost certainly impair the quality of their programming and hinder future efforts to improve service or programming.

The Table of Allocations adopted in 1952 is basically the same type of Table in use today, although a great many changes have been made over the years, as experience was acquired.⁴ Thus, the Table has long governed the location and service areas of television stations. The multiple ownership rules and duopoly and concentration rules have long controlled the number and location of television stations which an entity may own or control and the extent to which the signals of its stations may be extended. The rules and policies with respect to the operation of satellites⁵ and translator stations also limit the extension of the signals, and hence of the programs, of particular stations. None of these Commission rules or pol-

⁴The latest version of the Table, adopted in the Fifth Report in Docket No. 14229, released Feb. 11, 1966, provides for one or more television channel assignments to each of 792 different cities in the continental United States. 2 F.C.C.2d 527, 551 (1966).

⁵The term "satellite" is used here to describe a regularly licensed television station that rebroadcasts virtually 100% of the programs of the mother station. The limitation in the Commission's multiple ownership rules of a maximum of seven television stations per owner applies to satellites.

icies is subject to First Amendment challenge on the ground that it limits the range of the signals of television stations. *Cf. National Broadcasting Co. v. United States*, 319 U.S. 190, 226-227 (1943). No such rule or order has ever been struck down on First Amendment grounds. Certainly it is clear that a CATV system has no greater rights under the Constitution to extend a broadcast station's signals than the station itself has. When the Commission determines that a CATV system may not transmit the signals of a television station it is not regulating program content. It is merely determining where and under what circumstances the signals of those stations may be carried. This is precisely what the Commission does with television stations. The FCC is not required in the name of free speech to allow the stations in New York, Los Angeles and Chicago to operate satellite television stations and translators throughout the United States for the purpose of having their signals transmitted nationwide.⁶

⁶ In view of the limits validly placed upon the ability of television stations to extend their signals beyond the areas they normally serve, a flat prohibition against CATV accomplishing the same result would not have been subject to First Amendment attack. Therefore, it can make no difference, on the constitutional question, that the Commission's rules impose a "burden" on CATV systems by requiring evidentiary hearings before television signals from distant markets may be carried on CATV systems in the major markets. Indeed, there is provision in the rules for waiver of the hearing requirement, and appellant has been granted a waiver allowing it to carry a distant non-commercial educational station while the Toledo educational station is not on the air. *Buckeye Cablevision, Inc.*, File No. CATV 100-102, 5 F.C.C.2d ____ (1966); *id.*, F.C.C. 66-549, 4 F.C.C.2d 798 (1966).

Even if there were no provision for waiver—and in fact even if the Commission flatly prohibited importing distant signals into areas having their own present or prospective television stations—appellant could draw no support from *Weaver v. Jordan*, 411 P.2d 289 (Calif.), *cert. denied*, 385 U.S. ___, 87 Sup. Ct. 49 (1966). The court there struck down a state statute which totally proscribed subscription television in California, whether by closed circuit cable or by radio broadcast, and whether charge was made by the program or the month or some other basis. The

Appellant argues that "there is no factual basis" for the Commission's concern over the impact CATV could have upon UHF development. Two points are made. The first is that CATV helps rather than hampers UHF. The second is that other factors besides CATV "influence" decisions to enter new UHF markets. Neither point supports the assertion based upon them. There is indeed a "factual basis" for the Commission's concern.

Appellant's first point is wide of the mark. A CATV system can of course help a UHF station by making its signal available to viewers who cannot receive it off the air. The question is, at what cost? If a CATV system carries only local and area stations, both VHF and UHF, it performs a useful function in bringing UHF service to more homes⁷ and does not generally run afoul of the distant signal rules and policies. But if the system also carried a number of distant signals the viewership of its subscribers would have to be shared among the local and area stations and the distant stations. That is the situation at which the distant signal rules and policies are directed. And they impose no flat prohibition but instead

court referred to this as a "sweeping suppression" of subscription television, "a complete ban of expression and communication through a specified medium," 411 P.2d at 295. Prohibiting distant signal importation would not even constitute a "sweeping suppression" of CATV, let alone a "complete ban" of expression or communication. The distant signal rules are much more like the rules upheld in *National Broadcasting Co. v. United States*, *supra*. According to the court in *Weaver*, those rules differed from the subscription television statute in that the rules were designed "to avoid practices which would hinder growth of new networks and would deprive the listening public in many areas of service and would deprive local stations of much of their choice of programs," 411 P.2d at 298-99. (Emphasis is the court's.)

⁷ Increasingly, however, the all-channel receiver law results in the existence of larger numbers of television sets able to receive UHF, particularly with the set-buying that has been stimulated lately by increased use of color.

provide for evidentiary hearings in which to develop the "factual basis" for decision in particular cases. In such a hearing a CATV operator can show, if it is the fact, that it would help rather than hamper UHF development. Appellant will have just such an opportunity, for its request for approval of its proposed carriage of the Lansing station "will be designated for hearing in the normal course." *In the Matter of Buckeye Cablevision, Inc.*, File No. CATV 100-5, 3 F.C.C.2d 808, 813 (1966).

The argument that CATV is not the only factor influencing UHF development, which incidentally concedes that it can be an adverse factor, can be easily answered. Some of the other factors that can influence UHF development are beyond the Commission's power to control or even affect. Others are not beyond the Commission's power, and CATV is one of them. The Commission would be derelict if it failed to take steps to ameliorate CATV's potential impact on UHF television merely because it could not be certain that nothing else would have an impact.

Appellant also asserts that the Commission's rules go far beyond their legitimate objective. One supporting argument is that the distant signal rules and policies can preclude the importation of distant signals into a community without "the current prospect of any substitute." But in some cases distant signals should be kept out because of impact on existing service; in others, impact on stations applied for or under construction. Surely these would be cases where there is "current prospect" of a substitute. But whether or not there is such a "current prospect," flooding a market with multiple distant-city television signals can also diminish interest in activating channels for which there is not yet an applicant but which the Commission has allocated. The Commission is not required by the First Amendment to ignore the future growth of television needs and service. The Table of Allocations was attacked on an almost identical ground as appellant raises here, and its legality was sustained

by this Court, which held that the Commission could allocate channels on the basis of expected future demand for them and was not required to wait until there were applications for the channels. *Logansport Broadcasting Co. v. United States*, *supra*, 93 App. D.C. at 344-45, 210 F.2d at 26-27.

A second supporting argument is that the distant signal rules eliminate CATV as a "competitive factor" in television broadcasting. Suffice it to say, in reply, that the Commission believes that if CATV is unregulated *it* will eliminate or at least injure many television stations, and that it will do so unfairly because it stands outside the distribution system in which television stations must compete for programming. If a struggling new television station goes dark because CATV systems import signals from the huge metropolitan stations, the CATV system has eliminated the new station as a "competitive factor" in the area, and the public — particularly those who are not CATV subscribers — is the loser. Nothing in the First Amendment prohibits the Commission from taking steps to prevent such a result by applying reasonable rules to business enterprises that are within its statutory power to regulate.

Indeed, the distant signal rules are expressly designed to advance true freedom of speech — the freedom of all the people, rich and poor, urban and rural, to be exposed to the widest possible variety of both national and local news, viewpoints and entertainment. In the expert judgment of the FCC that freedom — and the correlative right of broadcasters to present the news, viewpoints and entertainment — would be injured by unchecked development and expansion of CATV carrying distant signals. For this Court to strike down the distant signal rules on First Amendment grounds would require the Court to conclude that the Commission's judgment was totally arbitrary and unreasonable. Intervenors respectfully suggest that the Court should not and cannot reach such a

conclusion. Cf. *Associated Press v. United States*, *supra*, 326 U.S. at 20:

"It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

II.

Adoption of the CATV Rules Did Not Violate Section 4 of the Administrative Procedure Act

Appellant complains that in adopting the CATV rules the Commission violated Section 4(a) of the Administrative Procedure Act because it failed to give adequate notice "as to the nature of its proceeding" leading to issuance of the rules. Appellant also argues that Section 4(b) of the APA has been violated by the Commission's failure to hold oral argument during the rule making proceeding.

Basically, appellant is urging that there should have been further delay in adopting CATV rules, and the Court may note that further delay might have meant "grandfather" rights for appellant's CATV system in Toledo.

There can be no question that the Commission gave adequate notice of at least the "nature of its proceeding." In the *Notice of Inquiry and Notice of Proposed Rule Making*, 1 F.C.C.2d 453, issued April 23, 1965, the

Commission divided the CATV rule making proceeding into two parts. Part I concerned the questions of jurisdiction, carriage and non-duplication. Treatment of these issues would be expedited. Part II involved a longer range inquiry into a number of additional aspects of CATV, but the question of interim solutions to the distant signal problem while the proceeding was underway was to be given expedited treatment along with the Part I issues.

The *Notice* expressly "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." 1 F.C.C.2d at 477. The Commission invited comment on possible measures to govern the "conditions under which CATV should be permitted to operate in areas [like Toledo] with potential for independent stations."⁸ In the interim, the Commission stated in paragraph 49 that applications for microwave facilities to relay television signals to CATV systems in such areas would not be granted without "a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area." Comments were also in-

⁸ An area "with potential for independent stations" would be one with "four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for)," 1 F.C.C.2d at 471. Toledo is just such a community. Two VHF stations (WSPD-TV and WTOL-TV) have been on the air for many years, and a new UHF station (WDHO-TV) recently began broadcasting. The city had only three commercial channel assignments until June 8, 1965, but on that date the Commission revised its Table of Allocations and assigned two additional commercial channels, both UHF, to Toledo. 47 C.F.R. § 73.606(b), as amended by Fourth Report and Order, Docket No. 14229, 5 R.R.2d 1587 (1965). A later revision in the Table, Fifth Report and Order, Docket No. 14229, 2 F.C.C.2d 527 (1966), did not change the Toledo assignments.

vited in paragraph 50 on an interim proposal to apply the same course of action to non-microwave CATV systems. An example of this proposal was a rule prohibiting extension of the signal of a television station beyond its Grade B contour into an area with potential for independent stations without the showing microwave applicants would have to make. 1 F.C.C.2d at 471-72.⁹

Additionally, the Commission invited comment on proposals that had been made in the petitions for rule making. 1 F.C.C.2d at 476-77. One petition had proposed a rule that would prohibit extension of a station's signal beyond the station's normal service area except with prior Commission approval or in accordance with regulations to be adopted. 1 F.C.C.2d at 457. Another petition proposed an interim rule which would stay the commencement of all new CATV operations in areas which are or soon would be served by three or more commercial television stations. 1 F.C.C.2d at 462. Intervenor MST proposed, in its petition for rule making, that (1) the Commission serve notice that all CATV systems would be subject to regulation and that some might be required to modify or cut back their operations, and (2) a CATV system be permitted to carry a station's signal only if the system were located in a prescribed signal contour of the station and/or if it were closer than a specified distance from the station. 1 F.C.C.2d at 463.

Intervenor MST filed "Part I" comments regarding the proposal contained in paragraphs 49 and 50 of the *Notice*. MST had been one of the early proponents of di-

⁹ Presumably appellant's complaint is limited to the distant signal rules. In discussing the matters of carriage and non-duplication, the Commission proposed to apply to all CATV systems the specific rules adopted that same day for microwave-fed CATV systems in First Report and Order, Docket Nos. 14895 and 15233, 38 F.C.C. 683 (1965). See 1 F.C.C.2d at 465. On the most stringent view of the requirements of Section 4(a) of the APA, the requirements were met with respect to these rules.

rect FCC regulation of CATV, and its comments received wide publicity. MST urged that the Commission adopt two kinds of interim rules to deal with the importation of distant signals and that they be applicable as of April 23, 1965. First, MST proposed a general prohibition on CATV extension of stations' signals beyond their Grade B contours except in particular, limited circumstances. Second, because a Grade B contour limitation would not in all cases limit "outside" signals adequately for purposes of the policy behind distant signal regulation, MST proposed that the Commission establish procedures to limit CATV importation of signals from one market into another, in appropriate circumstances, even where the system operated within the Grade B contours of the stations in the distant market.¹⁰

Thus, there has been, through the Commission's own proposals as well as others described in the *Notice*, clear notice that a Toledo CATV system would have to justify carrying a station like WJIM-TV by making a clear and full showing that doing so "would not pose a substantial threat to the development of independent UHF service in the area" or that other restrictions would be placed upon a CATV system like appellant's.¹¹ There has

¹⁰ Relevant excerpts from the MST comments are reproduced in the Appendix.

¹¹ Appellant complains that the proposed distant signal rule did not mention use of the top 100 markets as the governing criterion to determine when a CATV system would have to justify a proposal to extend the signal of any station beyond its Grade B contour. The complaint is without substance. The Commission employed the top-100-market standard as a convenient means to reach a more limited result than it had outlined in its proposed rule. The Commission said in the Second Report and Order that it was focusing principally on the top 100 markets because it felt that they are primarily the markets in which new UHF stations are most likely to develop. 2 F.C.C.2d at 783. In any event, Toledo fits the descriptions contained in both the proposed rule and the actual rule, and there is no possibility that appellant was misled by the change.

also been, through the MST proposals, clear notice¹² that a Toledo CATV system could be prohibited by general rule from carrying the Lansing station, WJIM-TV, and thereby extending the station's signal beyond its Grade B contour, a more stringent rule than was actually adopted.¹³

Appellant complains, however, that in the *Notice* the Commission indicated it was considering interim, not final, rules. The complaint wholly lacks substance.¹⁴ The Commission expressly stated in the *Second Report and Order* that it was dealing only with those aspects of the proceeding that were included in Part I and paragraph 50 of the *Notice*. 2 F.C.C.2d at 726. Paragraph 50 related to the matter of interim distant signal proposals. The distant signal rules, policies and procedures appear in a section of the *Second Report and Order* headed "Major Market, Distant Stations Policy—Para-

¹² Notice of a counter-proposal made by a participant in a rule making proceeding is notice within the meaning of the Administrative Procedure Act. *Owensboro on the Air, Inc. v. United States*, 104 App. D.C. 391, 262 F.2d 702 (1957), *cert. denied*, 360 U.S. 911 (1959).

¹³ The MST proposals also gave notice that a Toledo CATV system could be precluded from carrying any of the Detroit television stations, even though Toledo is in whole or in part within the Grade B contours of those stations. The Commission adopted this aspect of the MST proposal, incorporating it in a policy statement accompanying the rules. *Second Report and Order*, 2 F.C.C.2d at 786 n. 69.

¹⁴ In part appellant's claim is that the Commission indicated it would conduct further proceedings before issuing final rules. Appellant quotes three sentences from paragraph 64 of the *Notice*. In the same paragraph, however, the Commission made clear that to permit action without further proceedings, if that were found appropriate, it invited comment on proposals that had been made earlier in the petitions seeking institution of the rule making proceeding. 1 F.C.C.2d at 476-77. As pointed out above, p. 14, some of those proposals also gave notice of rules that would have prohibited appellant's carriage of WJIM-TV on its Toledo CATV system on an interim basis.

graph 49-50 of the Notice." 2 F.C.C.2d at 769. And the ordering clause states that "the proceedings in docket No. 15971 *Are not terminated* and . . . in light of the comments on part II of docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in the attached appendix . . . or additional rules may be adopted." 2 F.C.C.2d at 789. Thus, the rules adopted are in fact "interim", but it is difficult to see what difference that can make to appellant. In any event, whether or not particular rules are considered "interim" or "final," they are always subject to review and change by the Commission. As the Commission said in the *Second Report and Order*:

"As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for." 2 F.C.C.2d at 786.

Appellant also seems to complain of the failure of the Notice to propose that "grandfather" rights would be accorded CATV systems which had commenced carrying distant signals by a specified date. The nature of the complaint is quite puzzling. Appellant did not receive "grandfather" rights. Possibly appellant is complaining that the rules were made applicable as of the day they were first announced. But the *Notice* could not have predicted that date, and it was not required to. Moreover, as already noted, MST proposed that the distant signal rule be applied as of April 23, 1965, in other words, that any CATV system which had commenced or substantially expanded operations after that date would be required to cease operating or cut back to the extent required to conform to the new rule.

Section 4(a) of the Administrative Procedure Act requires that the notice of proposed rule making include "either the terms or substance of the proposed rule or a

description of the subject and issues involved." This provision must be interpreted in practical, not abstract, terms. "Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." *Logansport Broadcasting Co. v. United States*, *supra*, 93 App. D.C. at 346, 210 F.2d at 28; see *CAB v. State Airlines, Inc.*, 338 U.S. 572 (1950); *Chicago, St. P., M. & O. Ry. v. United States*, 322 U.S. 1 (1944); *Florida Economic Advisory Council v. FPC*, 251 F.2d 643, 102 App. D.C. 152 (1957), *cert. denied*, 356 U.S. 959 (1958); *City of Dallas v. CAB*, 94 App. D.C. 175, 221 F.2d 501 (1954), *cert. denied*, 348 U.S. 914 (1955). Even without regard to the proposals of MST, appellant's argument should be rejected, for the *Notice* was "as specific as the Commission could have made it at the time." *Wilson & Co. v. United States*, 335 F.2d 788, 795 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). Appellant did not choose to participate in the rule making proceeding in the face of clear warnings that rules might be adopted that would affect its interests. It should not be heard to complain now. The Commission should not be required to allow the public interest to suffer through more delay in adopting CATV rules.

Nor was the Commission required by Section 4(b) of the APA to hold oral argument before issuing the *Second Report and Order*. Appellant concedes, as it must, that oral argument is not required by law "in every case of administrative rule making." Instead, appellant takes the position that because the Commission has held oral argument in some other important rule making proceedings it should have done so in the CATV proceeding.

The answer is that the Commission also decides many important rule making questions without holding oral argument.¹⁵ Even if it did not, an administrative prac-

¹⁵ A recent example is the proceeding in Docket No. 14229, In the Matter of Fostering Expanded Use of UHF Television Chan-

tice does not become a legal requirement. An oral argument is not a necessary element of "administrative due process," and "whether and under what circumstances it [the FCC] will allow or require oral argument, except where the Act itself expressly requires it," has been "committed to the Commission's discretion" by such provisions as Section 4(j) of the Act, 47 U.S.C. § 154(j).¹⁶ *FCC v. WJR*, 337 U.S. 265, 281 (1949); see *American Broadcasting Co. v. FCC*, 85 App. D.C. 343, 348, 179 F.2d 437, 442 (1949).

Nothing in *American Airlines, Inc. v. CAB*, ___ App. D.C. ___, 359 F.2d 624, *cert. denied*, 385 U.S. ___, 87 Sup. Ct. 73 (1966), cited by appellant, suggests that the Commission was required to hold oral argument in the CATV rule making proceeding. The CAB had provided for oral argument in the rule making proceeding involved in that case, and hence there was no issue as to when oral argument was or was not required. Moreover, as the Court made clear, rule making is governed by Section 4 of the APA,

"which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules." ___ App. D.C. at ___, 359 F.2d at 629.

The Court did state that in particular cases it has im-

nels. This proceeding involved amendment of the Table of Allocations, 47 C.F.R. § 73.606(b), to encourage and facilitate fuller use of the UHF channels. The proceeding began in 1961 and in February of 1966 the Commission issued its Fifth Report and Memorandum Opinion and Order, 2 F.C.C.2d 527; the amended Table contains 1,756 channel assignments in 792 different cities in the continental United States. The Commission has not held oral argument in this proceeding.

¹⁶ Section 4(j) authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . ."

posed additional procedural requirements, including oral argument, which it "deemed inherent in the very concept of fair hearing . . ." However, the Court certainly did not lay down any broad rule that oral argument is required in all "important" rule making proceedings. There was no oral argument or evidentiary hearing in the proceeding reviewed in *Transcontinent Television Corp. v. FCC*, 113 App. D.C. 384, 308 F.2d 339 (1962), for example, yet that proceeding, though rule making, affected private rights in particular situations — much more than the CATV rule making. And appellant's claim that the FCC was guilty of bad faith in not holding oral argument in the CATV rule making proceeding must be rejected as mere hyperbole. The Commission determined that it had enough material before it (in a record of over 5,000 pages) to reach a decision without further proceedings. It also determined that further delay in reaching a decision would have been detrimental to the public interest. As it said in connection with its use of the February 15 "grandfather" date:

"Because of the rapid pace of CATV growth, even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree." *Memorandum Opinion and Order*, Docket Nos. 14895, 15233, and 15971, 3 F.C.C.2d 816, 821 (1966).

In rejecting the argument of the petitioners in *American Airlines*, the Court said, in language peculiarly appropriate here, that it

"might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay." ___ App. D.C. at ___, 359 F.2d at 632-33.

Appellant also relies on *Standard Airlines v. CAB*, 85 App. D.C. 29, 177 F.2d 18 (1949), and *L. B. Wilson v. FCC*, 83 App. D.C. 176, 170 F.2d 793 (1948). Neither

case supports the position that the Commission was required to hold oral hearings before issuing its CATV rules. *Standard Airlines* held that the CAB should have given a carrier an oral hearing before suspending the "operating permit" which the carrier had received from the same agency and without which the carrier could not legally operate at all. The CATV rule making proceeding bears no resemblance. *L. B. Wilson* involved the right of a radio licensee to a hearing, under what was then Section 312(b) of the Communications Act,¹⁷ when it claimed that a proposed new radio station would cause objectionable interference to the licensee's station. It, too, was not a rule making proceeding, and neither were any of the other cases appellant cites.

Finally, the very rule appellant complains of, Section 74.1107, itself provides for evidentiary hearings, and appellant's request for approval of its proposed carriage of the Lansing station "will be designated for hearing in the normal course." *In the Matter of Buckeye Cablevision, Inc.*, File No. CATV 100-5, 3 F.C.C.2d 808, 813 (1966).¹⁸ In other words, appellant, which did not bother to participate at all in the rule making proceeding, will have an oral, evidentiary hearing on the particular issue it is presumably concerned with—whether its Toledo CATV system may, consistently with the public interest, carry the signal of the Lansing station. Appellant is not entitled to more.

¹⁷ The substance of the old Section 312(b), with some important changes, now appears as Section 316 of the Communications Act, 47 U.S.C. § 316. The change was made by the Communications Act Amendments, 1952, 66 Stat. 711.

¹⁸ This decision was adopted the same day as the order under review in this case.

III.

**The Grandfather Provision in Section 74.1107
Is Not Unlawful, and the Rule Was Properly
Made Effective Upon Publication.**

Appellant next argues that Section 74.1107 is a "retroactive" rule, and hence unlawful, and, further, that it was improperly made effective immediately upon, instead of 30 days after, publication in the Federal Register.

The rule is not "retroactive." It attaches no penalty to conduct occurring prior to its adoption. Moreover, there was good cause to make it effective immediately.

Even a retroactive rule is legal if it is reasonable. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Welch v. Henry*, 305 U.S. 134 (1938). The constitutional prohibition against ex post facto laws applies only to criminal laws. *Calder v. Bull*, 3 U.S. 385 (1798). Here, however, there is no question of retroactivity. A rule that is retroactive is one that attaches legal consequences to conduct engaged in before the rule was adopted or issued. Thus, in *Welch v. Henry*, *supra*, a Wisconsin statute enacted in 1935 made taxable dividends from certain types of corporations in 1933. But under the CATV rules no penalties are imposed upon CATV systems for their conduct after February 15 but before March 17, 1966, the effective date of Section 74.1107. Thus, the "potential criminal penalties" appellant mentions (Brief, p. 27) could not be imposed upon any CATV system for operation in violation of Section 74.1107 prior to March 17, 1966.

Instead, the question is the appropriateness of February 15, 1966, as a "grandfather" date for the new distant signal rules. It is not uncommon for statutes extending regulatory authority to specified types of business activities to relate grandfather provisions to dates substantially earlier than the date of enactment of the new legislation. For example, Part II of the Interstate Commerce Act, newly extending the authority of the Interstate Com-

merce Commission to cover motor carriers, was enacted—and was "effective"—on August 9, 1935. 49 Stat. 543, 49 U.S.C. §§ 301 *et seq.* However, grandfather rights were limited to carriers or predecessors in interest who were in bona fide operation on June 1, 1935. 49 U.S.C. § 306(a)(1). Similarly, after admission of Alaska to statehood, Part II of the Act had to be amended to cover common carriers by motor vehicle between Alaska and the other states. This was done by Public Law 86-615 enacted July 12, 1960, 74 Stat. 382, but grandfather rights were limited to common carriers by motor vehicle engaged in business as of August 26, 1958. 49 U.S.C. § 306(a)(4), (5).¹⁹

By hypothesis a business enterprise that operates under "grandfather" rights is one that is not required to make the showing, otherwise required by law, that it is operating in the public interest. This suggests that purported "grandfather" rights should be strictly construed, for the public interest should be considered paramount so long as basic notions of fairness to private parties are observed.

"The applicant for a certificate under the grandfather clause seeks to exempt his further operations from scrutiny as to public convenience and necessity . . . As the Motor Carrier Act is remedial, and the grandfather clause confers a special privilege, the proviso defining exemptions is to be held to extend only to carriers plainly within its terms." *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 83 (1942); see *Alton R.R. v. United States*, 315 U.S. 15 (1942).

A determination under a grandfather provision does not

¹⁹ For similar provisions, see Part III of the Interstate Commerce Act, dealing with common carriers by water, added September 18, 1940, and limiting grandfather rights as of January 1, 1940, 49 U.S.C. § 909(a), and also the Civil Aeronautics Act of 1938, Sec. 401(e), 52 Stat. 973, 988, enacted June 23, 1938, which limited grandfather rights as of May 14, 1938.

involve an issue of "constitutional" fact. *Transamerican Freight Lines, Inc. v. United States*, 51 F. Supp. 405, 409 (D. Del. 1943).

What appellant's "retroactive" argument amounts to, then, is an argument that it should have been accorded "grandfather" rights because it began operating on March 16, 1966, the day before the new CATV rules formally made their public appearance in the Federal Register. To ensure that the record is clear, some events prior to March 17 must be set forth.

On February 15, 1966, at a press conference held by the Chairman of the FCC, which Commissioner Cox also attended, the Commission released an eight-page Public Notice (Mimeo No. 79927) announcing its plan for regulation of CATV systems whether or not served by microwave radio relay. As one of the "eight major points" in the plan, the Public Notice stated that:

"Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval before CATV service to subscribers may be commenced. This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.

"An evidentiary hearing will be held as to all such requests for FCC approval, subject, of course, to the general waiver provisions of the Commission's rules. These hearings will be concerned primarily with (a) the potential effects of the proposed CATV operation on the full development of off-the-air television outlets (particularly UHF) for that market, and (b) the relationship, if any, of proposed CATV operations and the development of pay television in that market. The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market."

Publicity about the Commission's new rules was immediate and widespread. For example, the Commission distributed almost 5,000 copies of the Public Notice on February 15 and during the few days following. Moreover, the National Community Television Association, the trade organization of the CATV industry, sent all its members a newsletter on February 18, 1966, in which it discussed the Public Notice in great detail, attaching a copy.²⁰

It is quite clear that if a "grandfather" date later than February 15 had been adopted, the Public Notice would have stimulated extraordinary efforts by CATV entrepreneurs to rush completion of enough construction to begin operating in time to acquire "grandfather" rights under the rules as formally issued. At the time of the Public Notice there were approximately 1,600 CATV systems operating, over 1,000 systems franchised but not yet operating, and approximately 2,000 applications for franchises pending before various city councils throughout the country.²¹ Indeed, one of the dominant characteristics of the CATV industry has been its fantastic growth during the last few years. And that growth appears to have increased, rather than diminished, since April 23, 1965, when the Commission "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." *Notice*, 1 F.C.C.2d at 477.

This case shows what would have happened if the Commission had selected a later "grandfather" date. There is no indication that appellant was not aware of the February 15 Public Notice shortly after its release. If anything, there is an indication that the Notice stimulated appellant to rush to begin supplying distant signals to

²⁰ See Memorandum Opinion and Order, Dockets No. 14895, 15233, and 15971, 3 F.C.C.2d 816, 823 nn. 7 and 8 (1966).

²¹ *Id.* at 821.

subscribers by March 17,²² and it now argues that March 17 rather than February 15 is the proper "grandfather" date and that it should not be required to show that its proposed carriage of the Lansing station is consistent with the public interest. Intervenor MST submits that appellant should not be permitted to shoehorn itself into a legal operation. The "grandfather" date should be upheld.

The foregoing also disposes of the objection to the Commission's action making the distant signal rules effective upon, rather than after, their publication in the Federal Register. The Administrative Procedure Act provides that in the ordinary case rules should be made effective at least 30 days after they are published or served upon the parties to which they apply. The Act recognizes, however, that good cause may exist for a different procedure, and appropriate exception is provided for. As the Commission has found, 2 F.C.C.2d 784-85,²³ and as we have shown, good cause for a different procedure does exist here. Given the selection of the February 15 date (which we have shown was properly intended to stop the proliferation of new systems and extension of existing systems into new areas) there was no reason whatever to delay the "effective" date of the distant signal rule. Postponing enforcement of the new rules would merely have increased claims by CATV systems that the Commission should not enforce the rules because of disruption of service, greater investment, and the like. No reason appears why the Commission should have stayed its hand in these circumstances, particularly where there was wide publicity of the substance of the rules a month before they were formally published in the Federal Register.

²² See *In the Matter of Buckeye Cablevision, Inc.*, File No. CATV 100-5, 3 F.C.C.2d 808, 809 n. 3 (1966).

²³ See also *Memorandum Opinion and Order*, Docket Nos. 14895, 15233 and 15971, 3 F.C.C.2d 816, 821 (1966).

IV.

**The Cease and Desist Proceeding Was Properly
Confined to the Single Issue of Compliance
With the Rules.**

Finally, appellant complains about the fairness of the cease and desist proceeding. The chief objection is that the Commission dealt with only one issue—compliance with the rules. What this amounts to is an argument that appellant, because it was violating the rules, should have received better treatment than those who are not.

Under the Commission's distant signal rules appellant must establish, in an evidentiary hearing, that carriage of the Lansing station on its CATV system would be consistent with the public interest. Appellant's petition for waiver of this requirement has been denied by the Commission but has been treated as a petition for a hearing, even though it did not request a hearing, and will be designated for hearing in the normal course. Apparently this favorable treatment does not satisfy appellant, for it complains, in effect, that the Commission did not convert the cease-and desist proceeding into a full blown inquiry into "all aspects of the public interest" surrounding carriage of the Lansing station. Yet this is precisely the inquiry the Commission plans to conduct in the hearing on appellant's distant signal petition.²⁴ Had the Commission acceded to appellant's request to expand the scope of the cease and desist proceeding, it would have been giving appellant's distant signal request expedited treatment because appellant was operating in violation of the rules, a clear invitation to other CATV operators to begin violating the rules instead of waiting their turn for a hearing on their proposals to carry distant signals. The Commission should not be required to conduct its business in this manner.

²⁴ This is not to say that the Commission will necessarily agree with appellant as to what "aspects of the public interest" will be relevant.

Appellant can draw no support from this Court's memorandum opinion in *Booth American Co. v. FCC*, No. 20,367 (Sept. 16, 1966). As the Court reemphasized in its later memorandum of October 3, 1966, in the same case, the stay issued by the Court was in part grounded on the actions of the appellant there having been taken prior to FCC clarification of the rules where appellant's interpretation had not been unreasonable, though different from the Commission's later interpretation.

"Our decision to grant a stay in the circumstances of this case is not to be taken as auguring a favorable reception for an applicant who does not tender a substantial justification, in terms of the express provisions of F.C.C. regulations and announcements for actions taken prior to F.C.C. clarification."

No such situation obtains here. Appellant merely went forward, after the Commission released the February 15 Public Notice, in disregard of the clear language of that notice. No question of interpretation of the Commission's rules was involved. The Court's decision on the stay in *Booth American* cannot be taken as a directive to the Commission to expand the scope of every cease and desist order proceeding in the manner in which appellant would wish.

CONCLUSION

The order under review should be affirmed.

Respectfully submitted,
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APPENDIX

Excerpts from Comments of Association of Maximum Service Telecasters, Inc., submitted on July 26, 1965, to the Federal Communications Commission in "Part I" of the rule making proceeding in Docket Nos. 14895, 15233 and 15971:

* * *

C. Effective Interim Rules Should Be Established Immediately and They Should Apply to Franchised and Operating, as Well as Prospective, CATV Systems.

100. The surge of CATV activity which we have described has continued unabated notwithstanding the Commission's actions of April 23, its statement to local franchising authorities in paragraph 50 of the April 23 *Notice of Inquiry* that they should proceed with caution and its warning to all existing and prospective CATV operators in paragraph 65 of the *Notice* that CATV operations may be subject to comprehensive regulation. Indeed, MST knows, and asserts without fear of contradiction, that various CATV interests since April 23 have been urging local authorities to grant franchises as fast as possible before the Commission issues further rules. Since April 23, CATV applications have been filed in at least 350 communities and granted in more than 200 communities. (*Television Digest CATV Activity Addenda*, April 26-July 19, 1965).

101. The need for immediate implementation of interim procedures to produce order out of chaos is clear and compelling. Hence, MST strongly supports the immediate adoption of interim rules, applicable to *all* CATV systems, designed to ensure that CATV does not jeopardize the growth and development of free television broadcast service pending adoption of effective long-range regulations to govern CATV.

102. There are a number of considerations which persuasively point to the nature and scope of the relief which is required. *First*, UHF development is important, regardless of the size of the market. *Second*, UHF development is important, whether it will provide additional television service to a vast metropolis or whether it will provide the first television service to a small city, or whether it will provide service to rural areas. *Third*, paragraph 49 of the *Notice of Inquiry* focuses on CATV activity in communities to which UHF channels are assigned and not on the entire service areas of present and potential stations. Moreover, paragraph 49 appears to focus unduly on a showing by a particular CATV system as to the effect of the operations of that system in the particular community in question on the maintenance and development of UHF service. But, to attempt to determine whether the importation of distant signals by a *single* CATV system in a *single* community would pose a substantial threat to UHF television broadcast service without regard to the total number of CATV systems operating, franchised or for which applications are pending or with respect to which there is other evidence of CATV activity within the entire service area of a given existing or prospective station is to approach the situation with blinders. The effect of any one system can be minimal, while as Mr. Frederick Ford put it so cogently (see paragraph 91 above), the total impact would be such that: "Ultimately, the ability of the station to adequately serve the public or even to survive could become questionable." *Fourth*, what is involved here is an *interim* policy. As the Commission put it, its "responsibilities are not discharged . . . by waiting 'until the bodies pile up'" before recognizing that a problem exists and doing something about it (FCC 65-335, para. 48(3)). While the Commission is deciding, as it will in the subsequent stages of these proceedings, what comprehensive regulations are required of CATV, it has no alternative but to make sure that the house does not burn down before the fire engine is built.

103. The most direct and effective interim rule would provide that, while the Commission is proceeding with the formulation of its final rules to deal comprehensively with long-range CATV regulation, no CATV system shall be permitted to extend the signal of any television broadcast station beyond its Grade B contour except upon a clear and full showing (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; and (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area. For the purposes of this rule, in all situations the coverage of a UHF station, existing or potential, should be treated as if the station were operating with the maximum facilities permitted by the rules of the Commission. Such an approach to coverage would encourage both the improvement of existing UHF facilities and the use of maximum facilities by potential new UHF stations.

104. The foregoing rule should be made effective immediately upon its publication¹ and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's *First Report and Order* and its *Notice of Inquiry and Notice of Proposed Rule Making*. Any CATV system which has commenced construction or operations or which was

¹Section 4(c) of the Administrative Procedure Act provides that any rule issued by an administrative agency may be made effective as of the date of its publication "upon good cause found and published with the rule". In view of the urgency of the situation, the Commission clearly has good cause to make the rule effective as soon as possible.

in existence prior to April 23 but which has substantially expanded its lines or the number of its subscribers in the community in question or has increased the number of stations carried since April 23 should be required to modify its operations to the extent necessary to bring it into conformance with the interim rule. Such action by the Commission is entirely reasonable in light of its admonition in the *Notice of Inquiry* to all existing and prospective CATV operators:

"[W]e believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." (FCC 65-334, para. 65).

In this connection, it should be noted that various aspects of the regulations indicated by the Commission go further than is proposed here. Paragraphs 51, 52 and 53 of the *Notice of Inquiry* dealt with general and final rules on the extension of television signals by CATV as well as so-called "leap-frogging".

105. An alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

106. In any event, whatever the timing, the Commission should make clear that to the extent it does not require any existing system to cut back operations which are inconsistent with the interim rule, the Commission does not thereby intend in any way to extend any "grandfather" rights to such CATV systems and that such operations will be subject to modification or curtailment as

may be required by the final rules adopted by the Commission.

* * *

IV. The Commission Should by Special Rules Provide Summary Procedures To Handle Requests for Other or Different Treatment Than Provided for in the Rules.

109. The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.

110. In its *Notice of Further Proposed Rule Making and Notice of Proposed Rule Making* in Docket Nos. 14895 and 15233, the Commission proposed adoption of specific procedures whereby a party could seek special relief by showing that provisions of the then proposed CATV rules should not apply in the particular circumstances of the case (FCC 63-1128, paras. 10-11 and proposed Sections 11.557 and 21.711). However, in its *First Report and Order* the Commission has deleted these proposed provisions, stating:

"The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations. Further, we have provided generally for the consideration of requests for waiver of any rule. (See Section 1.3 of the Rules.)" (FCC 65-335, para. 155).

However, neither existing procedures under the Act and the Commission's normal rules relating to applications nor the general waiver provision are adequate.

111. The present procedures for considering applications for permits, licenses and other authorizations would at the most only be applicable in the case of applications for microwave authorizations intended to serve CATV systems. Since the Commission has not asserted any general licensing authority over CATV systems, these procedures would not be applicable directly to CATV systems themselves and the Commission is proceeding to regulate CATV systems directly.

112. Nor does Section 1.3 of the existing rules afford an adequate procedure. This provision relates solely to the waiver of a rule. At best, it is doubtful that any party other than one to whom a rule is directed could request such a waiver. Thus, it is questionable whether a local broadcast station, for example, could seek the waiver of a rule which required or allowed a CATV system to carry the signal of another station in lieu of its signal. Moreover, even if it could do so, it is difficult to see how the relief would be adequate since Section 1.3 does not appear to contemplate anything other than a waiver or a *non-application* of the rule in question, whereas *affirmative* relief may be required. For example, the Commission recognizes that, with respect to its system of priorities among stations as to carriage and non-duplication, it may be necessary to "allow appropriate" relief upon the basis of a showing by one station that its signal should be afforded priority of treatment by the CATV system over the signals of another station which provides a calculated signal of equal or even higher grade (FCC 65-335, paras. 91(c) and 99, n. 55).

113. For such reasons, a procedure should be established by specific rule under which any party affected by the CATV rules could seek an exception or other appro-

priate special relief or treatment. We emphasize, however, that the procedures established for this purpose should require adequate notice to all interested parties, but should be summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time-consuming evidentiary hearings on these matters as a matter of course would not serve the public interest and, moreover, are not necessary in order to provide effective relief where relief is appropriate.

* * *

**SUPPLEMENTAL BRIEF FOR INTERVENOR,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

D. H. OVERMYER TELECASTING CO.,

STORER BROADCASTING CO., and

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

**APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals

for the District of Columbia Circuit

FILED JAN 30 1967

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January 30, 1967

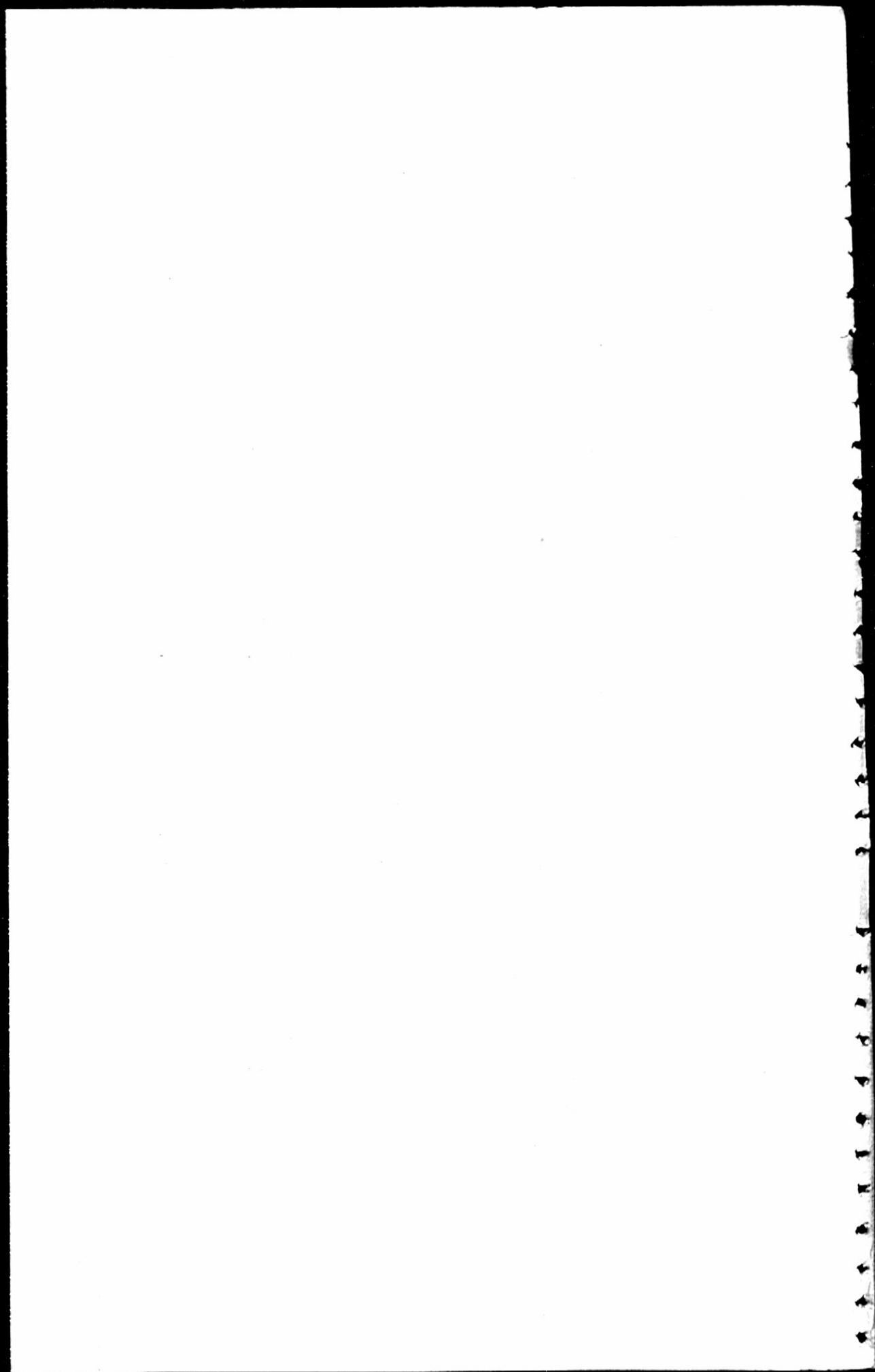


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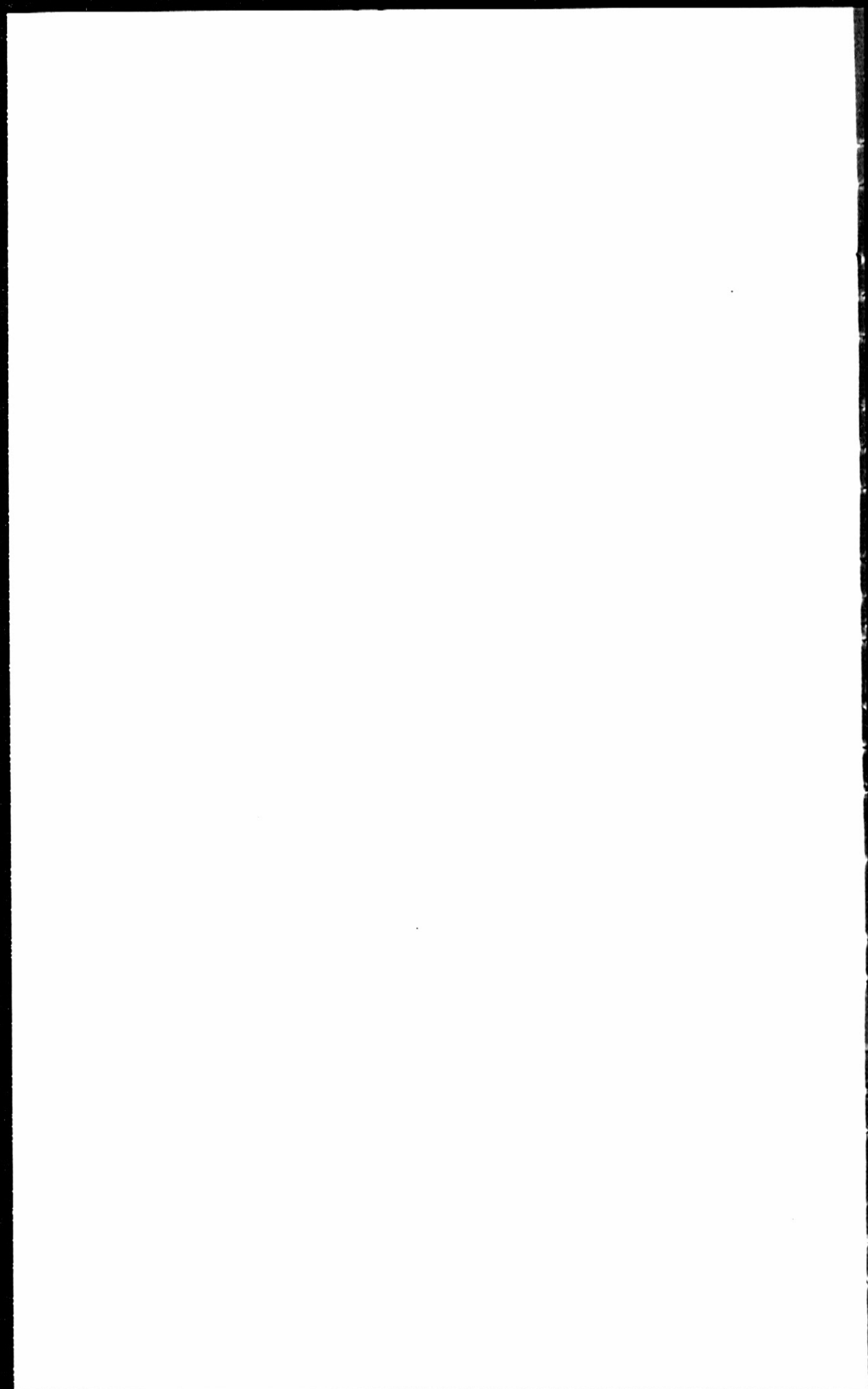
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BUCKEYE CABLEVISION, INC.,

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v.

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ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,

Intervenors.

APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL BRIEF FOR INTERVENOR, ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

Pursuant to oral order of the Court issued during the oral argument in this case on January 9, 1967, intervenor Association of Maximum Service Telecasters, Inc. ("MST") submits this supplemental brief in answer to the supplemental brief filed by appellant on January 19, 1967, addressed solely to the question of FCC regulatory authority over CATV systems without regard to whether such systems employ microwave facilities for relay of the television signals they distribute to their subscribers.

Appellant's CATV System Is Engaged in Interstate Communication by Wire or Radio and Is Subject to the Communications Act and to FCC Regulatory Authority.

Appellant first asserts that the Commission's regulatory authority "can not be presumed" and must be derived from the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* With this we agree; indeed, the Commission had to find express statutory authority to regulate CATV and could not have relied on some theory of "plenary power" to regulate all activities which have any connection with or relation to any aspect of interstate communications. But CATV systems, including appellant's, are instrumentalities of interstate communication by wire or radio, the Act applies directly to CATV and makes it subject to direct FCC regulation, and the Commission has the power, indeed the duty, to adopt appropriate regulations to integrate CATV into the national television structure.

A. CATV Constitutes "Interstate Communication by Wire or Radio" to Which the Act Applies.

Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), provides that the Act shall apply "to all interstate and foreign communication by wire or radio" and to all persons engaged in such communication. Sections 3(a) and (b), 47 U.S.C. § 153(a), (b), define wire and radio communication as the transmission of writing, signs, signals, pictures and sounds by means of wire and/or radio, including "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

CATV receives, forwards and delivers communications and is incidental to wire and radio transmission. See *Clarksburg Publishing Co. v. FCC*, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955). Moreover, CATV systems

are part of the stream of continuous interstate communications by radio and television. Appellant's CATV system, located in Ohio, carries signals of television stations located in Michigan and Canada. It is thus within FCC jurisdiction even though physically located within a single state. Even if all signals the system carried were those of stations in the same state as the system, many of the specific programs—those broadcast by networks, primarily—emanate from out of state and are delivered to appellant's subscribers by a continuous chain of interstate communication. See *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962); *Pacific Telatronics, Inc.*, 4 R.R.2d 145, 149 (1964); see also *United States v. American Tel. & Tel. Co.*, 57 F. Supp. 451, 454 (S.D. N.Y. 1944), *aff'd per curiam sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *Idaho Microwave, Inc. v. FCC*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965).

Under the circumstances it is not surprising that the National Community Television Association (NCTA), the trade association of the CATV operators and manufacturers, has not only conceded but argued that CATV is in interstate commerce.¹

¹ "A community antenna television system is directly concerned with television broadcasting, an area of governmental control of which there has been complete occupation by the Federal Government. . . ." Brief of NCTA before Conn. Public Utilities Commission, Docket No. 10250, p. 3 (1964). (Emphasis supplied.)

* * *

"Briefs are being filed with the Nevada PSC, calling the attention of that Commission to the fact that CATV systems are unquestionably engaged in interstate commerce" *Id.*, p. 9. (Emphasis supplied.)

* * *

"That community antennas are in interstate commerce for the purpose of inclusion in the broad field of radio and television may reasonably be argued [T]he Federal Communications Commission has actually exercised jurisdiction to promulgate rules and regulations affecting community antenna systems." *Id.*, Ex. B, p. 20.

*B. The Commission Has Power To
Regulate CATV Systems.*

Section 1 of the Communications Act, 47 U.S.C. § 151, directs the FCC to "make available to *all* of the people of the United States a rapid, efficient, Nationwide wire and radio communication service." (Emphasis added.) There are two especially relevant statutory corollaries of this mandate. Section 307(b) of the Act, 47 U.S.C. § 307(b), requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 303(h), 47 U.S.C. § 303(h), authorizes the FCC "to establish areas or zones to be served by any station."

In accordance with these provisions, the FCC in 1952 established limitations on the power and tower height, and hence the service areas, of television stations. At the same time, it adopted a table of television assignments allocating specific channels to specific communities to provide television service oriented to meet the individual needs and interests of the community and area served. This nationwide plan of local and area television broadcast service was upheld by this Court, *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954); *Peoples Broadcasting Co. v. United States*, 93 U.S. App. D.C. 78, 209 F.2d 286 (1953).

The Commission's approach also received the express approval of Congress when, in 1962, the all-channel receiver legislation (P.L. 87-529) was passed. We have discussed the purpose of this law and the circumstances which led up to its enactment in our principal brief, at pp. 4-6, and will not repeat that discussion here. Suffice it to say that the purpose of this unusual and far-reaching law was to make the allocations plan more effective by enabling the Commission to require that all television sets shipped in interstate commerce or imported from abroad

be capable of receiving not only the VHF but also the UHF television broadcast frequencies,² for Congress had found that increased utilization of the allocated UHF channels as well as continued utilization of the VHF channels was necessary to achieve "the goal" of

"a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." (H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); see Sen. Rep. No. 1526, 87th Cong., 2d Sess. 7 (1962).)

It would be difficult to find clearer support for the policy behind the television allocation plan adopted by the Commission in 1952, and basically the same type of allocation table is in use today.

The essential purpose of the CATV rules, policies and procedures adopted by the Commission is to prevent frustration of this allocations plan. Under Section 303(r) of the Act, 47 U.S.C. § 303(r), the Commission is authorized to "make such rules and regulations and prescribe such restrictions and conditions not inconsistent with law as may be necessary to carry out the provisions of this Act"; see also Section 4(i), 47 U.S.C. § 154(i). In *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943), the Supreme Court stated that "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." See also *American Trucking Assn's, Inc. v. United States*, 344 U.S. 298 (1953), which affirmed the power of the ICC, acting under a similar legislative mandate, to regulate practices which would disrupt its scheme of regulation if allowed to continue unregulated.

² The Commission has implemented the statute by appropriate regulations. 47 C.F.R. § 15.65(a).

After lengthy proceedings the Commission has concluded, for reasons such as those discussed in our principal brief, pp. 6-7, that if CATV is permitted to transport the signals of the largest metropolitan television stations into smaller communities across the country it may fragment the audience of the stations in those communities. If this occurs, these smaller stations will find it increasingly more difficult to maintain their present service, to increase or improve their service, or perhaps to survive; also, stations not yet on the air will remain unborn if their potential audience is wired up to CATV systems carrying distant signals. The CATV distant signal rules, policies and procedures seek to assure that each situation raising this possibility can, before it is too late, be examined in a hearing to determine where the public interest lies. CATV clearly presents the grave danger that the free television service provided by present or potential local and area stations will be impaired by CATV carriage of distant signals. The Commission has put itself in a position to act to prevent such frustration of the goals of the national television structure by instrumentalities of interstate communications by wire or radio,³ just as it had earlier adopted rules and policies that prevent large-market television licensees from frus-

³ Appellant does not appear to be complaining about the particular approach — case-by-case examination of CATV's possible effect in particular markets — adopted by the Commission in the *Second Report and Order*, 2 F.C.C.2d 725 (1966). MST firmly believes, and so urged upon the Commission, that a far better approach would have been to adopt a general rule prohibiting any CATV system from extending the signal of any television station beyond that station's normal service area into the normal service area of another television station except in very limited and carefully designed circumstances. Such an approach would have been within the Commission's power to "establish areas or zones to be served by any station," Section 303(h), and to prevent any person subject to the Act (which CATV systems are) from extending or otherwise tampering with such areas or zones. The approach the Commission did take was far more generous to CATV and is *a fortiori* within the Commission's power.

trating those goals by unlimited operation of satellite⁴ and translator stations.⁵ To say it lacks the power to act in such circumstances and in the light of the numerous statutory provisions cited above is wholly inconsistent with the Supreme Court's view that "Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 217.

The FCC's power to regulate CATV operations indirectly by means of conditions in the licenses of microwave facilities which serve CATV was affirmed in *Carter Mountain Transmission Corp. v. FCC*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963). The FCC's authority to regulate is not confined to such indirect means but includes the power to regulate CATV systems directly. Addressing itself specifically to the question of FCC regulatory authority over CATV before the Commission had asserted that authority, this Court had on two occasions intimated that the authority exists. *Clarksburg Publishing Co. v. FCC*, *supra*, 96 U.S. App. D.C. at 217, 225 F.2d at 517; *Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. 50, 56-57, 348 F.2d 56, 62-63 (1965); and see *Philadelphia Television Broadcasting Co. v. FCC*, 123 U.S. App. D.C. 298, 300 and n. 5, 359 F.2d 282, 284 and n. 5 (1966).

⁴ The term "satellite" is used here to describe a regularly licensed television station that rebroadcasts virtually 100% of the programs of the mother station.

⁵ Under long-standing rules and policies of the Commission, Los Angeles and New York television stations, for example, could not impair the viability of existing local television stations and jeopardize the well-being of future local television stations by extending their signals throughout the country through the use of satellite and translator stations. Yet, this is precisely what is threatened by CATV transmission of distant signals, absent effective FCC regulation.

*C. The Commission's Authority Is Not Confined
To Regulation of Common Carriers
and Licensing of Radio Stations*

Appellant asserts, however, that the Commission may not regulate a CATV system because it is not a common carrier by wire or radio under Title II of the Act and is not a radio station under Title III.⁶

There is nothing in the Act to indicate that common carrier regulation and radio station licensing and regulation are the sole functions of the Commission. The 1934 Act merged the common carrier functions of the ICC and the radio licensing functions of the Federal Radio Commission into one unified act under a single agency. The Act freed the new Commission of the need to fit its regulatory actions into a particular subcategory of communications. The 1934 Act is "a comprehensive scheme for the regulation of interstate communication," *Benanti v. United States*, 355 U.S. 96, 104 (1957), and the Communications Commission was created "to regulate all forms of communication," H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934), quoted in *Benanti*, 355 U.S. at 104 n. 14.

Appellant's argument has been effectively disposed of in a closely analogous situation. In *Carter Mountain Transmission Corp. v. FCC*, *supra*, the Commission denied an application for common carrier microwave fa-

⁶ Appellant apparently does not argue that the Commission's assertion of direct jurisdiction over CATV is precluded by past Commission attempts to obtain legislative confirmation of its authority to regulate CATV even after issuing the *Second Report and Order*, *supra*, which adopted the rules whose legality is challenged on this appeal. Such an argument would be foreclosed by *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950), as recently reaffirmed in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966); a court should not infer "that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress" because "public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations."

cilities to relay distant television signals to three CATV systems because of the likely impact on local television broadcast service. This Court rejected the argument that the Commission should not have applied principles of radio broadcast law to an application for common carrier facilities.

"Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958). . . . The interest of the listening and viewing public in better and more effective service is paramount." 116 U.S. App. D.C. at 96, 321 F.2d at 362.

The Court made it quite clear that Section 307(b) and other "Title III" provisions could be considered in deciding whether proposed common carrier facilities met the "public convenience and necessity" standard set forth in Section 214(a), 47 U.S.C. § 214(a), which is in Title II and which relates to common carriers by wire or radio.⁷

The Supreme Court's decision in *Regents of the University System v. Carroll*, 338 U.S. 586 (1950), had nothing to do with this question. In that case the Commission had renewed a radio license only on the condition that the licensee repudiate a stock purchase agreement with a third party, because the agreement jeopardized the licensee's

⁷ The applicant in *Carter Mountain* was a common carrier by radio, but there is nothing in the Court's opinion to suggest that it would have reached any different result if the applicant had been a common carrier by wire and hence not an applicant for a "license" from the Commission under Title III. The certificate of convenience and necessity required by Section 214(a) must be obtained by any "carrier" wishing to construct or operate a line, and a "carrier" is defined to be a person engaged as a common carrier for hire "by wire or radio," without any distinction being drawn between wire and radio, Section 3(h), 47 U.S.C. § 153(h).

financial ability to operate in the public interest. The agreement apparently contained no provision making it conditional upon FCC approval. The licensee repudiated the contract and, in defense to a breach of contract action in a state court, argued that the Commission's action was a defense because of the Supremacy Clause. The Supreme Court disagreed. It did not disturb, but rather assumed the correctness of, the Commission's action vis-a-vis the licensee. All the Court held was that the Commission could not adjudicate the licensee's private rights vis-a-vis the third party, who was not subject to the Communications Act:

"We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U.S. at 602.

That is not what the Commission is trying to do here.

Little doubt should remain, after *Carter Mountain*, that the Commission may regulate CATV as an integral part of television broadcasting. CATV is interstate communication by wire and — like a common carrier — is within the literal terms of Sections 1 and 2(a) of the Communications Act. The Commission "cannot let its decision in the [CATV] field interfere with its responsibilities in the television broadcasting field." 116 U.S. App. D.C. at 96, 321 F.2d at 362. Whether it is CATV or a common carrier that is being regulated, "the interest of the listening and viewing public in better and more effective service is paramount." *Ibid.* The Commission has sought to integrate CATV into the national television structure and to ensure that CATV supplements rather than supplants that structure. In this fashion the Commission is attempting to meet its statutory obligation to "generally encourage the larger and more effective use of radio in the public interest," Sec. 303(g), just as it was attempting to meet that obligation in 1952 when it first established a Table of Allocations governing the national television structure.

D. The Commission Has Not Attempted "To Control the Reception of Radio Signals"; Appellant's CATV System Is Not Merely a Master Antenna.

Appellant argues that the Commission may not control the reception and retransmission by wire of television signals. This is the "master antenna" argument. Appellant puts the emphasis on reception. It belongs on retransmission. The Commission's rules do not prevent appellant or anyone else from receiving television signals. Only retransmitting them (for a fee) is subject to regulation.

This "master antenna" argument has been effectively laid to rest not only by the Commission, 2 F.C.C.2d at 780, but also by a district court. In *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D. N.Y. 1966), a case involving copyright liability of CATV systems, the court said flatly:

"Defendant's [CATV] systems are not passive antennas. They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables. The term 'passive' signifies a device which does not add energy to any of the signals being handled by the system. In that sense, only the antenna and the cable are passive. All of the other equipment, such as the preamplifiers, 'Teletrol' demodulators and modulators, WCON converters, 'Channel Commanders' and line and distribution amplifiers, used by defendant's systems at various times, are active, not passive.

"The intensity of the electromagnetic waves as received at defendant's antenna is insufficient to enable them to travel along the coaxial cable to the subscribers and to produce an acceptable or viewable picture without the reproduction of the signals

received on new locally supplied energy at higher intensity by defendant's elaborate electronic equipment."⁸

In short, the Commission is not trying to tell "the viewers what television signals they may receive" (Supp. Br., p. 7). Rather the Commission is telling CATV systems — business entities engaged in interstate communication by wire or radio — what television signals they may retransmit under what circumstances.

⁸ The court went on:

"The dominant, over-all function and design of defendant's systems at all times — regardless of the individual instruments or specific equipment used from time to time — were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting TV program material to a large number of subscribers, who are, in effect, their audience. In view of the foregoing characteristics, defendant's systems are, in material respects, analogous to television stations, translator and repeater stations.

"Defendant's systems are communication systems for the reasons that they were designed and engineered to, and do, convey information from one location to other locations." 255 F. Supp. at 196.

CONCLUSION

The Court should affirm the Commission's regulatory authority over CATV, should uphold the rules adopted in the *Second Report and Order*, and should affirm the order under review.

Respectfully submitted,

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January 30, 1967

SPECIAL BRIEF ON COMMISSION
JURISDICTION FOR INTERVENOR STORER
BROADCASTING COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FILED JAN 30 1967

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ARGUMENT

I

THE COMMISSION HAS JURISDICTION TO REGULATE ALL CATV SYSTEMS

The Commission's legal memorandum in support of its jurisdiction and authority to regulate all CATVs, Joint Appendix, Vol. I, pp. 478-82, 793-97, is succinct and compelling, and we see no need to repeat it here. Briefly, the Commission's mandate from Congress is "to make available, so far as possible, to all of the people of the United States a rapid, efficient, Nation-wide . . . radio communications service" (Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151) in such a way as "to provide a fair, efficient, and equitable distribution of radio service to each of [the several States and communities]" (Section 307(b), 47 U.S.C. §307(b)). This mandate confers on the Commission "expansive," not "niggardly" authority. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219(1943). The Commission is not a mere "traffic officer" of broadcasting frequencies. *Id.* at 215-16.

The CATV regulation, challenged by Buckeye, is an essential part of the Commission's duty under Sections 1 and 307 of the Act. CATVs "are not passive antennas":

"They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables." *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D.N.Y. 1966)¹

¹ One indication of the contrast between Buckeye's proposed CATV system and a passive receiving antenna system such as a householder might install is given by Buckeye itself. Buckeye says it has already spent or committed more than \$1,000,000 in connection with that system (Jt. App., Vol. II, p. 6).

By not carrying local station signals, CATVs can effectively prevent local viewers from receiving local signals. Conversely, CATVs extend the signals of distant broadcasters hundreds of miles, distorting station allocations and frustrating potential new entrants, particularly UHF stations. CATVs transform one-station markets into twelve-station markets. They remake the national map of television broadcasting. Irrespective of signal source, be it microwave or off-the-air, CATVs form a potent tollgate between broadcaster and viewer. If the Commission cannot effectively regulate all CATVs, it cannot effectively regulate television broadcasting.

CATVs are interstate enterprises. They take, without paying, and sell network and other interstate signals distributed by local television stations. Most of the programs Buckeye's Toledo, Ohio, CATV and all other CATVs carry come from New York and Los Angeles and are carried simultaneously with their origination in those two cities. Moreover, the only station signal involved in this appeal is that of WJIM-TV in Lansing, Michigan.

Even if CATVs were not in interstate commerce, their impact on interstate broadcasting is so direct, close and substantial that the Commission would have jurisdiction to regulate them. In *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914), for example, even though the Interstate Commerce Act expressly prohibited ICC regulation of wholly intrastate commerce, the Court upheld the ICC's regulation of wholly intrastate rates, and the nullification of State Commission orders prescribing those rates, to the extent necessary to protect against unjust discrimination with respect to interstate rates. Here there is no similar statutory ban; CATVs are clearly in interstate commerce. Thus, the *Houston* doctrine is far stronger than is necessary to support Commission jurisdiction over CATVs. Commission regulation of CATVs is equally necessary to

prevent the frustration of the statutory scheme as was the case in *Houston*.

The Communications Act does not mention CATVs because the Act predates the first commercial CATV by fifteen years. But the fact that the 73rd Congress had never heard of a CATV does not mean that it intended that the Commission not regulate CATVs. On the contrary, Congress avoided any "itemized catalogue of the specific manifestations of the general problem for the solution of which it was establishing a regulatory agency," so as not to "frustrate the purposes for which the Communications Act of 1934 was brought into being . . . by stereotyp[ing] the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co. v. United States*, *supra*, at 219. It was Congress' anticipation of unforeseeable technological changes such as CATV which led it to grant the expansive powers of the Act.

The fact that Congress failed to foresee a particular problem in regulatory agency legislation has never been permitted by the courts to frustrate the clear legislative purpose. See, *e.g.*, *National Broadcasting Co. v. United States*, *supra*; *American Trucking Association v. United States*, 344 U.S. 298 (1953); *Public Service Commission of State of N. Y. v. Federal Power Commission*, 117 U.S. App. D. C. 195, 327 F.2d 893 (1964). These cases, all cited in the Commission memorandum, strongly support the Commission's jurisdiction over all CATVs. In the *New York Public Service Commission* case, for example, in interpreting Section 16 of the Federal Power Act, which is substantially identical to Section 303(r)² of the Communications Act, this Court said:

² Section 303(r), 47 U.S.C. § 303(r), provides:

"[Except as otherwise provided in this Act, the Commission from time to time, as the public convenience, interest, or necessity requires shall —] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

"All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation." *Id.* at 199, 327 F.2d at 897.

CATVs can directly frustrate the development of local broadcasting outlets of self-expression. Congress has sought to encourage and foster such development. Since the Commission is charged with responsibility for implementation of that policy, its exercise of jurisdiction of all CATVs is proper. See *American Trucking Association v. United States*, *supra*, at 311.

CATVs are a broadcasting problem. Buckeye cites (App. Supp. Br., p. 4, n. 4) *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966), for the proposition that CATVs are not common carriers. But in the *Philadelphia* case this Court held only that the Commission had chosen to regulate CATVs under its broadcasting, rather than common carrier jurisdiction and the Commission's interpretation of the Communications Act is entitled to "great deference." *Id.* at 299, 359 F.2d at 283. Without deciding the merits of the issue here, the Court said:

"In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners. This seems to us a rational and hence permissible choice by the agency." *Id.* at 300, 259 F.2d at 284.

II

BUCKEYE HAS NOT SHOWN TO THE CONTRARY

Buckeye's legal theory appears to be that (1) Congress granted the Commission carefully circumscribed jurisdiction over two well-defined and self-contained areas of endeavor, common carriage and radio broadcasting, (2) Buckeye is neither a common carrier nor a radio broadcaster, and, therefore, (3) the Commission is without jurisdiction to regulate Buckeye. But this compartmentalized view of the dynamic field of communications is unrelated to the "living problems of radio communications." *National Broadcasting Co. v. United States, supra*, at 219.

Buckeye claims that the Commission's powers "have meaning only as directly related to, the Commission's delegated authority to license radio stations." (App. Supp. Br., p. 5.) Assuming the correctness of this statement, we think Buckeye's Toledo CATV, which transforms Toledo from a 3-station market to a 12-station market, to the obvious detriment of potential new local UHF television stations, manifestly meets Buckeye's own test. And the impact of Buckeye on local broadcasting in Toledo is no different if it imports its signals off-the-air or via microwave.³

Buckeye inexplicably ignores the *NBC* case and relies on *Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950). In the *Regents* case, the issue before the Supreme Court was whether the Supremacy Clause prohibited a state from enforcing a contract which had been the basis of Commission refusal to renew a broadcasting license. The Court held that, while the Commission could make repudia-

³ Video Service Company, a Cox subsidiary, commonly owned with Buckeye, presently has pending before the Commission an application (FCC File Nos. 6476/83-C1-P-65) to bring, via microwave, Chicago television signals to Buckeye's Toledo CATV system.

tion of the contract a condition of renewal,⁴ it could not abrogate the contract. *Regents* seems to us to be *sui generis* and wholly inapplicable here.

Similarly, *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316 (1961), involving the authority of the Board to alter a certificate without notice or hearing after it had gone into effect, and *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290, 302 F.2d 875 (1962), involving the authority of the Board to issue an interim cease and desist order, are irrelevant. Neither case was concerned with any question as to the reach of the agency's jurisdiction. Each held only that the statutory scheme required a hearing.

CONCLUSION

The Commission's jurisdiction to regulate all CATVs should be upheld.

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⁴ At the time *Regents* was decided, Section 312 of the Communications Act did not provide for cease and desist orders. The Commission's only civil sanctions were license revocation or refusal to renew.

